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and Decisions

of the United States Court of Customs and Patent Appeals and the United States Customs Court

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This issue contains

DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

(T.D. 76-301)

Cotton Textiles—Restriction on Entry

Restriction on entry of certain cotton textile products, manufactured or produced in Pakistan

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., October 21, 1976.

There is published below the directive of September 20, 1976, from the Acting Chairman, Committee for the Implementation of Textile Agreements, concerning the restriction on entry of certain cotton textile products, in category 31, manufactured or produced in Pakistan. This directive amends that Committee's directive dated December 19, 1975 (T.D. 76-20).

This directive was published in the FEDERAL REGISTER on September 21, 1976 (41 FR 41137) by the Committee.

(QUO-2-1)

JOHN B. O'LOUGHLIN,
Director,
Duty Assessment Division.

UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Domestic
and International Business
Washington, D.C. 20230

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

September 20, 1976.

COMMISSIONER OF CUSTOMS
Department of the Treasury
Washington, D.C. 20229

DEAR MR. COMMISSIONER:

On December 19, 1975, the Chairman, Committee for the Implementation of Textile Agreements, directed you to prohibit entry

during the twelve-month period beginning on January 1, 1976 of cotton textiles and cotton textile products in certain specified categories, produced or manufactured in Pakistan, in excess of designated levels of restraint. The Chairman further advised you that the levels of restraint are subject to adjustment.[1]

Under the terms of the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, pursuant to paragraph 13 of the Bilateral Cotton Textile Agreement of May 6, 1975, between the Governments of the United States and Pakistan, and in accordance with the procedures of Executive Order 11651 of March 3, 1972, you are directed, effective on September 22, 1976 and for the twelve-month period beginning on January 1, 1976 and extending through December 31, 1976, to permit entry of an additional 5,172,414 units of cotton textile products in T.S.U.S.A. No. 366.1860 within Category 31 (other than shop towels), even though the level of restraint will be further exceeded.

The actions taken with respect to the Government of Pakistan and with respect to imports of cotton textile products from Pakistan have been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, the directions to the Commissioner of Customs, being necessary to the implementation of such actions, fall within the foreign affairs exception to the rule-making provisions of 5 U.S.C. 553. This letter will be published in the FEDERAL REGISTER.

Sincerely,

ROBERT E. SHEPHERD
Acting Chairman, Committee for the Implementation of Textile Agreements, and Acting Deputy Assistant Secretary for Resources and Trade Assistance

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[1] The term "adjustment" refers to those provisions of the Bilateral Cotton Textile Agreement of May 6, 1975, between the Governments of the United States and Pakistan which provide, in part, that: (1) within the aggregate and applicable group limits, specific levels of restraint may be exceeded by designated percentages; (2) these levels may be increased for carryover and carryforward up to 11 percent of the applicable category limit; and (3) administrative arrangements or adjustment may be made to resolve minor problems arising in the implementation of the agreement.

(T.D. 76-302)

Cotton Textiles—Restriction on Entry

Restriction on entry of cotton textiles and cotton textile products manufactured or produced in India

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., October 21, 1976.

There is published below the directive of September 29, 1976 received by the Commissioner of Customs from the Acting Chairman, Committee for the Implementation of Textile Agreements, concerning the restriction on entry of cotton textiles and cotton textile products in certain categories manufactured or produced in India.

This directive was published in the FEDERAL REGISTER on September 30, 1976 (41 FR 43235), by the Committee.

(QUO-2-1)

JOHN B. O'LOUGHLIN,
Director,
Duty Assessment Division.

UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Domestic and International Business
Washington, D.C. 20230

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

September 29, 1976.

COMMISSIONER OF CUSTOMS
Department of the Treasury
Washington, D.C. 20229

DEAR MR. COMMISSIONER:

Under the terms of the Arrangement Regarding International Trade in Textiles, done at Geneva on December 20, 1973, pursuant to the Bilateral Cotton Textile Agreement of August 6, 1974, as amended, between the Governments of the United States and India, and in accordance with the provisions of Executive Order 11651 of March 3, 1972, you are directed, effective on October 1, 1976 and for the twelve-month period extending through September 30, 1977, to prohibit entry into the United States for consumption and withdrawal from warehouse for consumption of cotton textiles and cotton textile products in Categories 1 through 64 in excess of the levels of restraint listed below. These goods shall be accompanied by an export visa.

Category	*Twelve-Month Level of Restraint*	
1-38 and 64	128,400,000	square yards equivalent
9/10	46,551,634	square yards
18/19	9,800,344	square yards
26 (other than duck)[1]	42,876,505	square yards
28–38 and 64	10,700,000	square yards equivalent
28–29	7,910,794	units
31	31,224,514	units of which not more than 18,734,710 units shall be in T.S.U.S.A. Nos. 366.1820, 366.1860, 366.2120, 366.2160, 366.2420, and 366.2460
34/35	1,580,701	units
39–63	21,400,000	square yards equivalent

Apparel products in Categories 39 through 63 made from handloomed fabrics of the cottage industry of India, not wholly by hand, and which are accompanied by an elephant-shaped certification, shall be permitted entry up to a level of 3 million dozen during the twelve-month period beginning on October 1, 1976 and extending through September 30, 1977, pursuant to the directive of March 16, 1976.

In carrying out this directive, entries of cotton textiles and cotton textile products in the foregoing categories, produced or manufactured in India and exported to the United States prior to October 1, 1976, shall, to the extent of any unfilled balances, be charged against the levels of restraint established for such goods during the period October 1, 1975 through September 30, 1976. In the event that the levels of restraint established for that twelve-month period have been exhausted by previous entries, such goods shall be subject to the levels set forth in this letter.

With the exception of apparel products in Categories 39 through 63, made from handloomed fabrics of the cottage industry, not wholly by hand, which are accompanied by the elephant-shaped certification, the levels of restraint set forth above are subject to adjustment in the future according to the provisions of the bilateral agreement of August 6, 1974, as amended, between the Governments of the United States and India which provide, in part, that: (1) within the aggregate and group limits of the agreement, specific levels of restraint may be

[1] In Category 26 the T.S.U.S.A. numbers for duck fabric are:
320.—01 through 04, 06, 08
321.—01 through 04, 06, 08
322.—01 through 04, 06, 08
326.—01 through 04, 06, 08
327.—01 through 04, 06, 08
328.—01 through 04, 06, 08

exceeded by designated percentages; (2) these same levels may be increased for carryover and carryforward up to 10 percent of the applicable category limit; and (3) administrative arrangements or adjustments may be made to resolve minor problems arising in the implementation of the agreement. Any appropriate adjustments under the provisions of the bilateral agreement referred to above will be made to you by letter.

A detailed description of the categories in terms of T.S.U.S.A. numbers and factors for converting category units into equivalent square yards was published in the FEDERAL REGISTER on February 1, 1975 (40 FR 5010), as amended on December 30, 1975 (40 FR 60220).

In carrying out the above directions, entry into the United States for consumption shall be construed to include entry for consumption into the Commonwealth of Puerto Rico.

The actions taken with respect to the Government of India and with respect to imports of cotton textiles and cotton textile products from India have been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, the directions to the Commissioner of Customs, being necessary to the implementation of such actions, fall within the foreign affairs exception to the rule-making provisions of 5 U.S.C. 553. This letter will be published in the FEDERAL REGISTER.

Sincerely,

ROBERT E. SHEPHERD
Acting Chairman, Committee for the Implementation of Textile Agreements, and Acting Deputy Assistant Secretary for Resources and Trade Assistance

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(T.D. 76-303)

White or Irish Potatoes, Other Than Certified Seed—Tariff-Rate Quota

Tariff-rate quota for the quota year beginning Septem er 15, 1976, for white or Irish potatoes, other than certified seed

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., October 21, 1976.

The tariff-rate quota for white or Irish potatoes, other than certified seed, pursuant to item 137.25, Tariff Schedules of the United States, for the 12-month period beginning September 15, 1976, is 45,000,000 pounds.

The estimate of the production of white or Irish potatoes, including seed potatoes, in the United States for the calendar year 1976, made by the United States Department of Agriculture as of September 1, 1976, was in excess of 21 billion pounds.

In accordance with headnote 2, part 8A, of schedule 1, Tariff Schedules of the United States, the quantity is not increased because the estimated production is greater than 21,000,000,000 pounds.

(QUO–2)

VERNON D. ACREE,
Commissioner of Customs.

[Published in the FEDERAL REGISTER October 28, 1976 (41 FR 47268)]

(T.D. 76–304)

Cancellation with Prejudice of Customhouse Broker License 2968 and Individual License 4482

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., October 20, 1976.

Notice is hereby given that the Commissioner of Customs on October 20, 1976, pursuant to section 641, Tariff Act of 1930, as amended (19 U.S.C. 1641), and section 111.51(b), Customs Regulations, as amended, upon the specific request of Norman G. Jensen, Palo Alto, California, canceled with prejudice individual customhouse broker's license No. 4482 issued to him on November 1, 1971, for the Customs District of San Francisco, and corporate customhouse broker's license No. 2968 issued to Norman G. Jensen, Inc., a corporation incorporated under the laws of the State of California, on December 11, 1970. The Commissioner's decision is effective as of October 20, 1976.

(BRO–3–02)

VERNON D. ACREE,
Commissioner of Customs.

[Published in the FEDERAL REGISTER October 28, 1976 (41 FR 47268)]

(T.D. 76-305)

Foreign Value—Tapered Roller Bearings

Notice that foreign value, as described in section 402a(c) of the Tariff Act of 1930, as amended, exists with respect to sales of tapered roller bearings in the Japanese domestic market

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., October 20, 1976.

Pursuant to an American manufacturer's petition filed in accordance with the provisions of section 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), the Customs Service has considered whether the appraised value of tapered roller bearings from Japan is too low, and has notified the petitioner of its determination.

The petitioner contended that foreign value, as described in section 402a(c) of the Tariff Act of 1930, as amended (19 U.S.C. 1402(c)), represented by the prices at which tapered roller bearings are offered by distributors in the Japanese domestic market, is the proper basis for the appraisement of tapered roller bearings from Japan. In support of this contention, the petitioner referred to a report of investigation prepared by a Customs Representative in Japan, dated November 28, 1975, which, the petitioner asserts, establishes that tapered roller bearings are freely offered for sale at the distributor level to all purchasers in the domestic market.

The Customs Service agrees that the report establishes that one distributor did, in fact, freely offer for sale in the domestic market, at price list prices plus 10 percent, those tapered roller bearings found on the price list of a Japanese manufacturer, Koyo Seiko Co., Ltd., and that the report indicates that at least two other distributors may also have freely offered such merchandise. On the basis of this report, the Customs Service also agrees that foreign value existed as to those bearings and bearings similar to those bearings at the time of the investigation.

It is the understanding of the Customs Service that the predominant use of Japanese tapered roller bearings is in the manufacture of automobiles and that large numbers of these automobiles are sold and driven in Japan. It is apparent that a market for the sale of replacement bearings continues to exist in Japan. It further appears that sales of replacement bearings by distributors are being made at fixed prices available to all. Therefore, it is the opinion of the Customs Service that, in the absence of specific information to the contrary and based on the report of investigation, foreign value continues to exist with respect to the sale of those bearings found on the price list of Koyo

Seiko Co., Ltd., and to the sale of bearings that are similar to those bearings.

Accordingly, with respect to such bearings entered for consumption or withdrawn from warehouse for consumption more than 30 days after the date of publication of this notice in the Customs Bulletin, appraisement will be made on the basis of foreign value or export value, whichever is higher, as provided by section 402a(a)(1) of the Tariff Act of 1930, as amended (19 U.S.C. 1402(a)(1)), until such time as additional information may be received by the Customs Service which causes Customs officers to believe that foreign value or export value does not exist.

A notice of the filing of the American Manufacturer's petition was not published in the FEDERAL REGISTER, as the petition was filed prior to the amendment to section 175.21 of the Customs Regulations (19 CFR 175.21) which requires such publication.

(R:CV:V)

G. R. DICKERSON,
Acting Commissioner of Customs.

[Published in the FEDERAL REGISTER October 28, 1976 (41 FR 47268)]

(T.D. 76-306)

Ports of Entry—Customs Regulations amended

Section 1.2(c), Customs Regulations, amended to establish Orlando, Florida, as a Customs port of entry

DEPARTMENT OF THE TREASURY,
Washington, D.C., October 19, 1976.

TITLE 19—CUSTOMS DUTIES

CHAPTER I—UNITED STATES CUSTOMS SERVICE

PART I – GENERAL PROVISIONS

On August 12, 1976, there was established in the FEDERAL REGISTER (41 FR 34049) a notice of a proposal to establish a Customs port of entry at Orlando, Florida, in the Tampa, Florida, Customs district (Region IV). No comments were received in response to this proposal.

Accordingly, by virtue of the authority vested in the President by section 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR, 1949–1953 Comp., Ch. II), and pursuant to authority provided by Treasury Department Order No. 190, Rev. 12 (September 14, 1976), Orlando, Florida, is hereby designated as a Customs port of entry in the Tampa, Florida, Customs district (Region IV).

The geographical limits of the Orlando, Florida, port of entry shall include all the territory within the following boundaries:

> Beginning at the intersection of the Seaboard Coast Line Railroad right-of-way and the Bee Line Expressway (State Road No. 528), proceeding in an easterly direction along the Bee Line Expressway to its intersection with State Road No. 15, then proceeding due south to the boundary between Orange and Osceola Counties, Florida, then proceeding west along the boundary between Orange and Osceola Counties, Florida, to the Seaboard Coast Line Railroad right-of-way, then proceeding northerly along the Seaboard Coast Line Railroad right-of-way to its intersection with the Bee Line Expressway.

To reflect this change, the table in section 1.2(c) of the Customs Regulations (19 CFR 1.2(c)) is amended by inserting "Orlando, Florida, (T.D. 76-306)" between "Jacksonville (including territory described in T.D. 69-45)." and "Port Canaveral, Fla. (including territory described in T.D. 66-212)." in the column headed "Ports of entry" in the Tampa, Florida, Customs district (Region IV).

(Sec. 1, 37 Stat. 434, sec. 1, 38 Stat. 623, as amended (19 U.S.C. 1, 2))

Effective date. This amendment shall become effective 30 days from the date of publication in the FEDERAL REGISTER. (095995)

(ADM-9-03)

JERRY THOMAS,
Under Secretary of the Treasury.

[Published in the FEDERAL REGISTER October 27, 1976 (41 FR 47032)]

(T.D. 76-307)

Cotton, Wool, and Manmade Fiber Textiles—Restriction on Entry

Restriction on entry of cotton, wool, and manmade fiber textile products manufactured or produced in the Republic of the Philippines

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., October 22, 1976.

There is published below the directive of August 31, 1976, received by the Commissioner of Customs from the Acting Chairman, Committee for the Implementation of Textile Agreements, concerning export visa requirement for cotton, wool, and manmade fiber textile products manufactured or produced in the Republic of the Philippines.

This directive was published in the FEDERAL REGISTER on September 9, 1976 (41 FR 38204), by the Committee.

(QUO-2-1)

JOHN B. O'LOUGHLIN,
Director,
Duty Assessment Division.

UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Domestic and International Business
Washington, D.C. 20230

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

August 31, 1976.

COMMISSIONER OF CUSTOMS
Department of the Treasury
Washington, D.C. 20229

DEAR MR. COMMISSIONER:

Under the terms of the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, pursuant to the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of October 15, 1975, between the Governments of the United States and the Republic of the Philippines, and in accordance with the provisions of Executive Order 11651 of March 3, 1972, you are directed to prohibit, effective on October 10, 1976, and until further notice, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton textiles and cotton textile products in Categories 1–64, wool textile products in Categories 101–132, and man-made fiber textile products in Categories 200–243, produced or manufactured in the Republic of the Philippines, for which the Government of the Republic of the Philippines has not issued an appropriate visa.

The export visa will be a circular stamp in blue ink on the front side of the invoice (Special Customs Invoice Form 5515, successor document, or commercial invoice, when such form is used) and will include the signature and title of an official authorized by the Government of the Republic of the Philippines to issue visas. A facsimile of the visa is enclosed.

You are further directed, effective on October 10, 1976, to exempt from the levels of restraint established under the bilateral agreement shipments, of cotton, wool, and/or man-made fiber textile products valued under $250; handmade cottage industry products of handloomed fabrics; and traditional Philippine folklore handicraft textile products which have been certified for exemption by the Government of the Republic of the Philippines in accordance with the procedure described below.

The certification will be a rectangular stamp in blue ink on the front side of the invoice (Special Customs Invoice Form 5515, successor document, or commercial invoice, when such form is used) and will include the signature and title of the official authorized to issue the

certification; identify the items exempted; indicate the date the certification was signed and certified; and carry the certificate number. In the space marked "Description" on the certification stamp, the Government of the Republic of the Philippines will indicate that the shipment is either valued at less than $250; is a handmade cottage industry product of handloomed fabric; or will include the name of the particular Philippine traditional folklore product. A copy of the certification stamp is also enclosed.

An export visa will not be required to accompany shipments of exempt cotton, wool and man-made fiber textile products.

Cotton, wool and man-made fiber textile products, exported from the Republic of the Philippines prior to the effective date of this directive shall not be denied entry until December 9, 1976.

Merchandise covered by an invoice which has an exempt certification but includes both exempt and non-exempt textile products, will be denied entry.

You are directed to permit entry into the United States for consumption and withdrawal from warehouse for consumption of designated shipments of cotton, wool, and/or man-made fiber textile products, produced or manufactured in the Republic of the Philippines, notwithstanding the designated shipment or shipments do not fulfill the aforementioned visa and certification requirements, whenever requested to do so in writing by the Committee for the Implementation of Textile Agreements.

Textile products of the cottage industry of the Philippines which have been certified exempt from the levels of restraint of the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of October 15, 1975, between the Goverments of the United States and the Republic of the Philippines should be reported in accordance with the instructions transmitted in the letter of March 7, 1975 from the Chairman of the Committee for the Implementation of Textile Agreements.

A detailed description of the categories in terms of T.S.U.S.A. numbers was published in the FEDERAL REGISTER on February 3, 1975 (40 FR 5010), as amended on December 31, 1975 (40 FR 60220).

In carrying out the above directions, entry into the United States for consumption shall be construed to include entry for consumption into the Commonwealth of Puerto Rico.

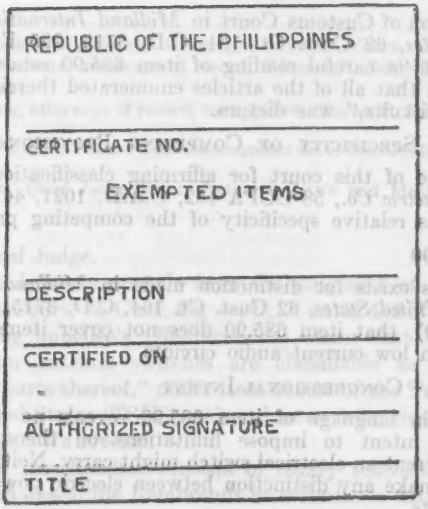
The actions taken with respect to the Government of the Republic of the Philippines and with respect to imports of cotton, wool and man-made fiber textile products from the Philippines have been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States.

Therefore, the directions to the Commissioner of Customs, being necessary to the implementation of such actions, fall within the foreign affairs exception to the rule-making provisions of 5 U.S.C. 553. This letter will be published in the FEDERAL REGISTER.

Sincerely,

ARTHUR GAREL
Acting Chairman, Committee for the Implementation of Textile Agreements, and Director Office of Textiles


REPUBLIC OF
THE PHILIPPINES
NO.
TEXTILE EXPORT VISA
SIGNATURE
TITLE
DATE


REPUBLIC OF THE PHILIPPINES
CERTIFICATE NO.
EXEMPTED ITEMS
DESCRIPTION
CERTIFIED ON
AUTHORIZED SIGNATURE
TITLE

222-126—76——3

Decisions of the United States Court of Customs and Patent Appeals

(C.A.D. 1175)

THE UNITED STATES v. REMBRANDT ELECTRONICS, INC. No. 76–4
(— F. 2d —)

1. CLASSIFICATION – SWITCHES

Customs Court decision sustaining importer's claim that television antenna switches are classifiable as "television apparatus, and parts thereof," under item 685.20 TSUS rather than "electrical switches" under item 685.90 TSUS. Reversed.

2. MIDLAND INTERNATIONAL CORP. v. U.S.

Conclusion of Customs Court in *Midland International Corp.* v. *United States*, 62 Cust. Ct. 164, C.D. 3715, 295 F. Supp. 1101 (1969) that "a careful reading of item 685.90 establishes to our satisfaction that all of the articles enumerated therein are for use in power circuits," was dictum.

3. RELATIVE SPECIFICITY OF COMPETING PROVISIONS.

Rationale of this court for affirming classification in *U.S.* v. *General Electric Co.*, 58 CCPA 152, C.A.D. 1021, 441 F. 2d 1186 (1971), was relative specificity of the competing provisions.

4. ITEM 685.90

No basis exists for distinction made in *Midland International Corp.* v. *United States*, 62 Cust. Ct. 164, C.D. 3715, 295 F. Supp. 1101 (1969), that item 685.90 does not cover items suitable for use only in low current audio circuits.

5. EVIDENCE – CONGRESSIONAL INTENT

The plain language of item 685.90 reveals no evidence of a legislative intent to impose limitations on the magnitude of electric current an electrical switch might carry. Neither does plain language make any distinction between electric power and audio-type circuits.

6. ID.

In absence of evidence to contrary, common meaning of words must prevail.

7. ID.

Item 685.90 must be deemed to apply to merchandise enumerated therein without regard to whether circuit in which it is used is power or low-current circuit.

8. STARE DECISIS

Departures from precedent are not favored, but stare decisis must give way when restudy of facts and issues clearly shows error in earlier opinions. Past references to an artificial power distinction in item 685.90 constitute error requiring correction.

9. GENERAL INTERPRETATIVE RULE 10(ij)

Provision for "electrical switches" more definitely describes a television antenna switch and therefore must prevail over a provision for "television apparatus and parts thereof," by virtue of the second portion of Rule 10(ij).

United States Court of Customs and Patent Appeals, October 21, 1976

Appeal from United States Customs Court, C.D. 4613

[Reversed.]

Rex E. Lee, Assistant Attorney General, *Andrew P. Vance*, Chief, Customs Section, *Ira J. Grossman*, attorneys of record, *Edmund F. Schmidt*, attorneys of record, for appellant.

Shaw and Stedina, attorneys of record, for appellee, *Charles P. Deem*, of counsel.

[Oral argument October 4, 1976 by Edmund F. Schmidt for appellant and by Charles P. Deem for appellee]

Before MARKEY, *Chief Judge*, RICH, BALDWIN, LANE and MILLER, *Associate Judges*.

MARKEY, Chief Judge.

[1] The United States appeals from the judgment of the United States Customs Court, 75 Cust. Ct. —, C.D. 4613, 405 F. Supp. 588 (1975) sustaining appellee's (Rembrandt's) claim that certain imported television antenna switches are classifiable as "television apparatus, and parts thereof," under item 685.20 of the Tariff Schedules of the United States (TSUS) rather than as "electrical switches" under item 685.90. We reverse.

The imported merchandise consists of rotary television antenna switches made in Japan for Rembrandt in accordance with specifications in U.S. Patent number 2,585,670 for a television antenna system.

The Patent specification teaches use of the imported switch for alternatively connecting different combinations of television antenna arms to produce improved picture quality or reception for a given station. Rembrandt, a licensee under the patent, used the switches solely in the manufacture of indoor television antennas.

The switches were originally classified by the Regional Commissioner under item 685.90, TSUS, which reads:

Part 5: ELECTRICAL MACHINERY AND EQUIPMENT

*	* * * * * * *	
Item 685.90	Electrical switches, relays, fuses, lightning arresters, plugs, receptacles, lamp sockets, terminals, terminal strips, junction boxes and other electrical apparatus for making or breaking electrical circuits, for the protection of electrical circuits, or for making connections to or in electrical circuits; switchboards (except telephone switchboards) and control panels; all the foregoing and parts thereof-----	17.5% ad val.

Rembrandt's contention, sustained by the Customs Court, was that the switches were more properly classifiable under item 685.20:

Item 685.20	Radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and television transmission and reception apparatus, and television cameras; record players, phonographs, tape recorders, dictation recording and transcribing machines, record changers, and tone arms; all of the foregoing, and any combination thereof, whether or not incorporating clocks or other timing apparatus, and parts thereof:	
*	* * * * * * *	
	Radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and television	

transmission and reception apparatus, and parts thereof:	
Television apparatus, and parts thereof	10% ad val.

Another pertinent statutory provision is:

10. *General interpretative rules.*—For the purposes of these schedules—

* * * * *

(ij) a provision for "parts" of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part.

The Customs Court grounded its decision on the premise that item 685.90 "has been held to relate to electrical power applications," relying on *Midland International Corp.* v. *United States*, 62 Cust. Ct. 164, C.D. 3715, 295 F. Supp. 1101 (1969), and *General Electric Co.* v. *United States*, 63 Cust. Ct. 140, C.D. 3887 (1969), *aff'd*, 58 CCPA 152, C.A.D. 1021, 441 F. 2d 1186 (1971). The Customs Court stated:

The switches herein have been established by competent testimony to be utilized in the antenna portion which picks up the transmitted television signal. Such application is not a power circuit and hence the involved switch is not the type intended to be covered by said item 685.90, *supra*.

* * * * * * *

Inasmuch as said articles are not switches within the scope of item 685.90, *supra*, they are consequently not governed by rule 10(ij), *supra*.

Because the switches had been manufactured to precise specifications, to fit and make operative the patented television antenna system, and because the government conceded that the switches were used exclusively in television antennas, the court sustained Rembrandt's claimed classification as "parts of television reception apparatus" under item 685.20.

Opinion

The distinction between "electrical power circuits" and "low current audio circuits" upon which the Customs Court relied had its genesis in *Midland International Corp.* v. *United States*, supra. There the Customs Court was faced with a protest to the classification of certain connectors, jacks and plugs under item 685.90. The importer claimed that the merchandise should fall under item 685.50 as "Other" articles of that section. The Customs Court held that the importer had failed to prove sole or chief use of the merchandise as required by Rule 10(ij) and, therefore, overruled the protest. [2] In addition, however, the Customs Court stated that "[a] careful reading of item 685.90 establishes to our satisfaction that all of the articles enumer-

ated therein are for use in power circuits." Although that conclusion was dictim, it seems to have been emphasized in later opinions of this court containing overly broad language directed to the scope of item 685.90. [3] In *United States* v. *General Electric Co.*, 58 CCPA 152, C.A.D. 1021, 441 F. 2d 1186 (1971), the court agreed with the classification of certain radio earphone jacks, very similar to those in *Midland*, under item 685.22 rather than under 685.90. The rationale for doing so, however, was the relative specificity of the competing provisions:

> We conclude with the Customs Court that "other electrical apparatus for making or breaking electrical circuits" in item 685.90, TSUS, is not a specific provision for the imported jacks, and that the jacks are properly classifiable as parts of radio reception apparatus under item 685.22, TSUS. Therefore, we *affirm* the judgment below. [58 CCPA at 156.]

[4] Language elsewhere in our General Electric opinion has nonetheless been construed as approving the Customs Court's earlier statement that *Midland* "held that items enumerated in item 685.90 were intended for use in power circuits and did not cover items suitable for use only in low current audio circuits." *General Electric Co.* v. *United States*, 63 Cust. Ct. 140, 144, C.D. 3887 (1969). Upon careful review, we are convinced that no basis exists for that distinction.

[5] The plain language of item 685.90 reveals no evidence of a legislative intent to impose limitations on the magnitude of electric current and electrical switch might carry. Cf. *United States* v. *Ampex Corp.*, 59 CCPA 134, C.A.D. 1054, 460 F. 2d 1086 (1973); compare *Castelazo and Ass.* v. *United States*, 69 Cust. Ct. 34, C.D. 4371 (1972), with *Inter-Maritime Forwarding Co.* v. *United States*, 77 Cust. Ct. —, C.D. 4667 (1976). Neither does that plain language make any distinction between electric power and audio-type circuits. In the absence of evidence to the contrary, the common meaning of the words must prevail. *United States* v. *C. J. Tower & Sons*, 48 CCPA 87, 89, C.A.D. 770 (1961). Item 685.90 must therefore be deemed to apply to the merchandise enumerated therein without regard to whether the circuit in which it is used is a power or low-current circuit.[1]

[8] Departures from precedent are not favored, but stare decisis must give way when restudy of the facts and issues clearly shows error in earlier opinions.[2] *H. W. Robinson Air Freight Corp.* v. *United*

[1] Our conclusion on the issue does not disturb the result reached in *United States* v. *John V. Carr & Sons, Inc.*, 61 CCPA 41, C.A.D. 1116, 495 F. 2d 771 (1974). We properly found the control boards there involved to be classifiable under item 685.90, though dictum in our opinion repeated the power versus audio or low-current circuit distinction appearing in *General Electric* and *Midland*.

[2] Appellee cites seven cases in which agreed statements of fact have been submitted in reliance on *General Electric*. A close review shows that all of these cases dealt with the same type jacks which were involved in *General Electric*. The present opinion, therefore, has no effect on any of those cases.

States, 48 CCPA 148, C.A.D. 782 (1961). Past references to an artificial "power" distinction in item 685.90 constitute error requiring correction.

Because the imported switches are parts particularly designed for specific and sole use with television antennae, they fall within the first portion of General Interpretative Rule 10(ij). [9] The government argues, however, that the provision for electrical switches more definitely describes the article and therefore must prevail over a "parts" provision, by virtue of the second portion of Rule 10(ij), and we agree.

The judgment of the Customs Court is *reversed*.

(C.A.D. 1176)

SPANEXICO, INC. v. THE UNITED STATES, No. 76-8 (— F. 2d —)

1. APPRAISEMENT – FURNITURE

Customs Court judgment sustaining appraisement, made on the basis of export value under § 402 of the Tariff Act of 1930, as amended (70 Stat. 943), of furniture and parts of iron or wood and other household and illuminating articles imported from Mexico, affirmed.

2. SECTION 402(f)(1)(B) – FAIR MARKET VALUE

To establish purchase price of imported merchandise as export value, one who is a selected purchaser, within the meaning of § 402(f)(1)(B) of the Tariff Act of 1930, as amended (70 Stat. 943), must show that price paid fairly reflected market value. In deciding whether such a showing has been made, it is proper to consider whether sales were at arm's length and evidence of relationship between seller and purchaser.

3. ID. – EVIDENCE

Where unrestricted, interest-free advance by purchaser to seller not satisfactorily explained as advance against purchase price and where officer of purchaser performed services for seller without compensation, Customs Court justified in requiring evidence as to sales and purchases of others of such or similar merchandise.

4. ID.

Documentary evidence of sales and purchases by others, consisting of entry papers and invoices, insufficient in that documents describe merchandise to which they pertain in only cursory manner and are not otherwise identified as pertaining to merchandise similar to that at bar.

5. COST OF PRINTING

Since trial judge ruled testimony which appellee had designated for printing struck from record, appellee is assessed cost of printing such testimony in transcript.

United States Court of Customs and Patent Appeals, October 21, 1976

Appeal from United States Customs Court, C.D. 4616

[Affirmed.]

Edward N. Glad (Glad, Tuttle & White) attorney or record, for appellant. *Rex E. Lee*, Assistant Attorney General, *David M. Cohen*, Chief, Customs Section, *Velta A. Melnbrencis*, attorneys of record, for appellee.

[Oral argument on October 4, 1976 by Edward N. Glad for appellant and by Velta A. Melnbrencis for appellee]

Before MARKEY, *Chief Judge*, RICH, BALDWIN, LANE and MILLER, *Associate Judges*.

RICH, Judge.

[1] This appeal is from the judgment of the United States Customs Court, 75 Cust. Ct. 123, C.D. 4616, 405 F. Supp. 1078 (1975), sustaining the Government's appraisement of certain "furniture and parts of iron or wood and other household and illuminating articles." The merchandise was manufactured by Gavaldon, S.A. (herein "Gavaldon") of Tijuana, Mexico, and was imported during the period April through November 1970. Appraisement was made on the basis of export value. We affirm.

STATUTORY PROVISIONS

The pertinent statutory provisions are found in section 402 of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956 (70 Stat. 943):

Sec. 402. VALUE

* * * * * * *

(b) *Export Value.*—For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

* * * * * * *

(f) *Definitions.* For the purposes of this section—

(1) The term "freely sold or, in the absence of sales, offered for sale" means sold or, in the absence of sales, offered—

(A) to all purchasers at wholesale, or

(B) in the ordinary course of trade to one or more selected purchasers at wholesale at a price which fairly reflects the market value of the merchandise.

without restrictions as to the disposition or use of the merchandise by the purchaser, except restrictions as to such disposition or use which (i) are imposed or required by law, (ii) limit the price at which or the territory in which the merchandise may be resold, or (iii) do not substantially affect the value of the merchandise to usual purchasers at wholesale.

(2) The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the merchandise undergoing appraisement, have been normal in the trade under consideration with respect to merchandise of the same class or kind as the merchandise undergoing appraisement.

Proceedings Below

The Customs Court noted that the parties agreed that export value was the proper basis for appraisement, but found that the Government's appraisement was erroneous. Nevertheless, the court sustained the appraisement [1] because appellant had "failed to prove that its claimed values, i.e., the invoice prices, represent the proper dutiable values of the importations in question." More particularly, the Customs Court found that appellant, being the exclusive customer of Gavaldon, was thus a "selected purchaser" within the meaning of section 402(f)(1)(B), supra, and had the burden "to establish (1) that the sales to it were in the ordinary course of trade and (2) that its claimed values fairly reflected the market value of the merchandise." The court concluded that appellant had failed to establish either. Referring to the first of the two above requirements, the Customs Court stated that "there is no evidence whatever about the conditions and practices existing in the trade" and that, as between appellant and Gavaldon, "the record presents merely an outline of a rather unusual relationship." The evidence of this "unusual relationship" showed the following facts. After appellant's previous supplier had gone out of business, appellant's president requested a social friend (Sergio Gavaldon), who had never been in the furniture business, to

[1] The Customs Court actually affirmed the appraised values "with the exceptions (1) that the correct dutiable value for style 104 in entry 103137 is $36.00 each; and (2) that the correct dutiable value for style 5001 in entry 106032 is $4.25 each." The reason for making these exceptions was that "the government appraising officer conceded that as to these two entries he had erred in appraising the above listed style numbers and that the correct appraised values for such styles are those set out above."

set up Gavaldon in Tijuana. Appellant advanced Gavaldon $146,892.20 "without any interest and apparently without any guarantee that the money would not be used to manufacture furniture for sale to others." Although purchase orders from appellant to Gavaldon totaled "some $118,000" from April through October 1970, only $80,600 of the advance had been repaid. Indeed, the evidence showed that the balance was never paid, but was compromised by a payment of $8,000. As the Customs Court also pointed out, a signature card was filed in April 1970 with a San Diego bank identifying appellant's secretary-treasurer as the bookkeeper for Gavaldon, and authorizing her to draw checks on its accounts at that bank. She drew checks on those accounts and on an account of Gavaldon at another bank and reconciled those accounts, all without compensation from Gavaldon.

As to the second of the two above requirements, the Customs Court stated:

> Considering (i) that the relationship of the parties has not been fully explained; (ii) that an arms length transaction has not been shown; and (iii) that there is no probative evidence as to sales and purchases by others of such or similar merchandise, there can be no basis for concluding that Gavaldon, S.A.'s invoice prices to Spanexico fairly reflected the market value of the merchandise.

Appellant's Argument

Appellant argues that the Customs Court erred in not finding that sales to it by Gavaldon were in the ordinary course of trade, stating that "The only question under this point is whether the sellers in the ordinary course of trade in the trade under consideration sell to selected wholesalers or to all who care to buy." Appellant defines the "trade under consideration" as "Mexican furniture manufacturers who exported to the United States and who happened to be located in Tijuana," and argues that "All of the evidence" shows that these manufacturers "sold their merchandise to one selected wholesaler." Appellant would allay the Customs Court's concern about its advance to Gavaldon by stating that "the unrebutted testimony shows that it was customary for furniture manufacturers in Mexico to request advances on orders from importers."

Appellant also faults the Customs Court for not finding the invoice prices as claimed by appellant to be a fair reflection of the market value of the imported merchandise. Appellant states that "unrebutted testimony" establishes that appellant and Gavaldon were "independently financed, operated and controlled enterprises dealing at arms length," and that "the *specific* prices for sales between the exporter and appellant were negotiated and were based on market conditions when applicable." According to appellant, the evidence

shows that the uncompensated services performed for Gavaldon by appellant's secretary-treasurer were "ministerial" and performed "upon the *direction* of Gavaldon, S.A." Criticizing the Customs Court for even requiring evidence of prices in "other kinds of transactions," appellant states that the court was in error "in thereafter giving no weight to appellant's evidence which established the specific prices of competitive similar merchandise in Plaintiff's Collective Exhibit 10."

OPINION

We agree with the decision of the Customs Court.

[2] Appellant does not deny that, as a selected purchaser of Gavaldon, it was obliged to show that the price it paid for the imported merchandise fairly reflected market value. In deciding whether such a showing has been made, we consider whether the sales were at arm's length and the evidence showing the relationship between appellant and Gavaldon. [3] Appellant does not deny that it made an unrestricted, interest-free advance to Gavaldon. Appellant's assertion, by way of explanation, that it was customary for Mexican furniture manufacturers to require an advance on orders from importers, is inconsistent with the evidence showing that the amount of the advance eventually repaid was less than the value of appellant's purchase orders, suggesting that the advance and sales were separate transactions. The lack of a satisfactory explanation for the advance raises doubt as to the independence of appellant and Gavaldon. The doubt is further compounded by uncontradicted testimony that an officer of appellant wrote checks for Gavaldon and reconciled its accounts, all without compensation from that firm. Appellant's insistance that the services afforded were ministerial, and performed only upon the direction of Gavaldon, does not explain, as the Customs Court pointed out, why Gavaldon, a Mexican manufacturer, would want its sole American purchaser to know how its funds were spent. These circumstances and others fully justified the Customs Court in requiring evidence as to sales and purchases by others of such or similar merchandise. But there was no such evidence. [4] Appellant is mistaken in its contention that its Plaintiff's Collective Exhibit 10 is sufficient in this regard. That exhibit consists of entry papers and invoices from another importer. They describe the merchandise to which they pertain in only a cursory manner, and appellant has pointed to nothing in the record which would show that the articles covered by these documents were identical or similar to the merchandise at bar.

Since we affirm the Customs Court with respect to appellant's failure to establish that its claimed invoice prices fairly reflected the market value of the imported merchandise, we need not consider whether appellant's purchases were in the ordinary course of trade.

Taxation of Costs

[5] Appellant has moved, pursuant to Rule 5.6(c) of this court, to impose the cost of printing the testimony of James Wait on pages 89 through 95 of the transcript. It does appear, as appellant states, that this testimony was designated by appellee "solely for the testimony that appears on page 95 of said Transcript," the remaining testimony being merely preparatory. Since the trial judge ruled that the testimony on page 95 be stricken from the record, none of that testimony was necessary or even available for our consideration of this appeal. Appellee, therefore, shall pay the cost of printing the testimony of James Wait appearing on pages 89 through 95 of the transcript.

The judgment of the Customs Court is *affirmed*.

Decisions of the United States Customs Court

Customs Decision

(C.D. 4670)

TILTON TEXTILE CORP. *v.* UNITED STATES

PILE FABRIC—WOVEN COTTON FABRIC

Certain greige unbleached woven cotton fabric was classified by the government as a velveteen pile fabric under item 346.15 of the Tariff Schedules of the United States. The importation was held not to be a pile fabric within the meaning of the heading governing item 346.15 and was therefore held properly classifiable under item 320.14, as claimed by plaintiff.

PILE FABRIC

Legislative history and lexicographic authorities establish that to constitute a pile fabric the cloth must be covered at least in part by

a raised pile projecting from the surface which pile may be wholly or partly cut or uncut. The merchandise in issue lacks the requisite raised pile formation.

Court Nos. 73–6–01404, etc.

Port of Norfolk

[Judgment for plaintiff.]

(Decided October 15, 1976)

Siegel, Mandell & Davidson (*Steven S. Weiser* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Robert B. Silverman*, trial attorney), for the defendant.

Lamb & Lerch (*David A. Golden* of counsel) as amicus curiae.

MALETZ, Judge: This action involves the proper classification of "carded greige unbleached woven fabric, wholly of cotton, Style No. 44144," exported from Portugal and entered at the port of Norfolk, Virginia in 1969 and 1970. The merchandise was classified by Customs as a pile fabric, specifically, cotton plainback velveteen, under item 346.15 of the Tariff Schedules of the United States (TSUS) and assessed duty at the rate of 25 per centum ad valorem.

Plaintiff contends that the import is not a pile fabric within the intendment of item 346.15 and its governing heading, but that it is properly classifiable as cotton woven fabric, not fancy or figured: not bleached and not colored: of number 14, under item 320.14, TSUS, as modified by Pres. Proc. 3822, which during the involved period carried a duty rate of 9.42 or 9.94 per centum ad valorem depending upon the date of entry.

The pertinent provisions of the Tariff Schedules of the United States read as follows:

Assessed under:		
Schedule 3, Part 4, Subpart A:		
	Pile fabrics, in which the pile was inserted or knotted during the weaving or knitting, whether or not the pile covers the entire surface, and whether the pile is wholly or partly cut or is not cut:	
	Of cotton:	
*	* * * * * * *	
	Velveteens:	
346.15	Plain-back	25% ad val.
Claimed under:		
Schedule 3, Part 3:		

Part 3 head note:

1. This part covers all woven fabrics in the piece, of any width and with or without fast edges, including gauze and leno-woven fabrics, but does not include—

(i) any woven fabrics which are specially provided for in the provisions of part 4 of this schedule;

* * * * * * * * *

Subpart A:

* * * * * * *

Woven fabrics other than the foregoing, wholly of cotton:

Not fancy or figured:

Not bleached and not colored:

* * * * * * * *

320.14	Of number 14	9.42% or 9.94% ad val. [depending upon the date of entry]

I

The pleadings establish the existence of all the elements necessary to support plaintiff's claim for classification under item 320.14. However, headnote 1(i) of schedule 3, part 3, *supra*, provides that articles classifiable under part 4 of schedule 3 are excluded from classification under part 3 of that schedule. Accordingly, it is plaintiff's burden to establish error in the presumptively correct classification of the merchandise under item 346.15.

Summarizing our conclusions at the outset, we find that, for tariff classification purposes, velveteen must have a certain characteristic weave or construction, described *infra*, and a raised pile, which may be wholly or partly cut or not cut, issuing from the fabric and covering its surface at least in part. Since the imported fabric presents no such pile face or effect, we conclude that it is not within the ambit of the pile fabrics provision under which it was classified and is properly classifiable under item 320.14, as claimed by plaintiff.

II

The testimony of record[1] conflicts on several points; however, it is not disputed that a common denominator of all pile fabrics is their construction, which consists of a foundation cloth made of warp and filling threads, and an extra set of threads, which may be warp or filling yarns, which form the pile. Essentially, there are two types of pile fabrics: warp pile fabrics, such as velvet, plush and terry fabrics, which are constructed with an additional set of warp threads; and filling pile fabrics, such as velveteen and corduroy, which are constructed with an extra set of filling yarns.[2]

Velveteen is constructed of a foundation or base cloth made of warp yarns interlaced with one set of filling (or weft) yarns known as binder picks or foundation picks and an extra set of filling yarns, variously referred to by the witnesses as pile threads, pile floats, filling picks, pile picks, filling floats, float picks and loops, which interlace with the warp yarns in a fixed pattern. Thus, the additional filling thread may, for example, interlace with one or more warp yarns and then "float" over the surface of the fabric covering three or more warp yarns to interlace again with the next one or more warp ends and repeat the floating processes. The floats are staggered in the weave, as shown in defendant's exhibit B, which was prepared by the witness Gray, and which, reproduced in part below, presents illustrative cross sections of what Gray calls a "single U" plainback weave, and a "W" plainback weave.[3]

---

[1] Plaintiff introduced 11 exhibits into evidence and called two witnesses: Theodore Stone, president of the plaintiff corporation, who had purchased the subject merchandise; and Francis K. Burr, associate director of Fabric Research Laboratories, Inc., a research and consulting firm for the textile industry in connection with textile fibers and fabrics, who now analyzes fabric defects and construction and acts as an expert witness in judicial and arbitration proceedings.

Defendant had 9 exhibits received into evidence and called four witnesses: John Gray, chief fabric designer for Crompton Company, now the sole domestic manufacturer of velveteens; Alan A. Lowe, director of fabric development and new products for Greenwood Mills, Inc., a manufacturer of woven and knit fabrics which had also manufactured velveteen in the greige until 1971; Stephen Siegel, director of technical services, Cottons and Blends Division, of J. P. Stevens, Inc., a manufacturer of textile products, including pile fabrics; and Richard Lutzer, textile analyst and assistant chief of the Fibers Branch, U.S. Customs Laboratory.

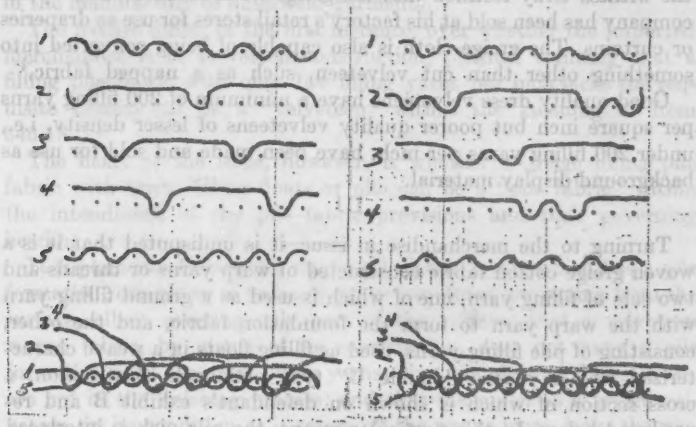
Two joint exhibits were received, and the official entry papers were admitted into evidence without being marked.

[2] Although not limited thereto, the pile fabrics provided for by name in the tariff schedules are cotton corduroys and velveteens, terry fabrics, velvets, plushes, velours and chenilles.

[3] Lines 1 and 5 in each column represent the warp and filling yarns which form the foundation cloth, and lines 2, 3 and 4 represent the staggered filling floats.

CROSS SECTION OF VELVETEEN WEAVES

SINGLE U PLAINBACK W PLAINBACK



The dots represent the warp yarn.
The numbered lines represent the filling yarn.

Woven warp pile fabrics are constructed so that they come off the looms with a raised pile, which may consist of cut ends or loops, on the surface of the fabric. Thus, velvet, which is usually woven by a so-called "double cloth" method, has a pile consisting of cut ends, whereas terry cloth is woven so that it may have cut or uncut loops, or a combination of both emerging from either side of the fabric.

Filling pile fabrics, on the other hand, come off the loom in the weave mill with their filling floats or pile picks uncut, Thus, fabrics with a velveteen or corduroy weave must have their floats cut in the finishing process in order to obtain the pile formation on the fabric surface. When the pile picks which (as noted) consist of extra threads are cut, the foundation fabric remains undisturbed.

The pile on velveteen usually presents an overall smooth face because of the staggered system of filling floats whereas in corduroy, because of the arrangement of the filling floats, the pile consists of ridges or wales.

The velveteen woven fabric that comes off the looms is a greige goods which, for conversion into cut finished velveteen, is sent to a finishing plant where the filling floats are cut with knives to create a pile on the face of the fabric. The fabric is also subjected to other

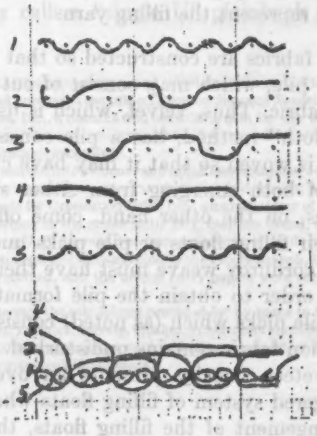
finishing operations which may include dyeing, bleaching and the application of an adhesive or other substance to keep the cut pile from shedding.

There is some limited commercial use for greige uncut fabric. Thus, the witness Gray testified that the greige cloth manufactured by his company has been sold at his factory's retail stores for use as draperies or curtains. The greige cloth is also capable of being converted into something other than cut velveteen, such as a napped fabric.[4]

Good quality dress velveteens have a minimum of 200 filling yarns per square inch but poorer quality velveteens of lesser density, i.e., under 200 filling yarns per inch, have been made and sold for use as background display material.

III

Turning to the merchandise in issue, it is undisputed that it is a woven greige cotton fabric constructed of warp yarns or threads and two sets of filling yarn, one of which is used as a ground filling yarn with the warp yarn to form the foundation fabric, and the other, consisting of pile filling yarns, used as filling floats in a weave characterized by Gray as a "double U" type plainback construction, a cross section of which is shown on defendant's exhibit B and reproduced below. In this particular weave, the pile pick is interlaced



Lines 2, 3 and 4 represent the filling floats.

[4] A napped cloth, as described by the witness Burr, is (R. 37):

* * * one whose surface has been brushed with wire brushes; can be a sanding operation; can be a teaseling operation. The fibers of the surface have been disturbed by a rubbing action which produces a soft sueded type finish.

under two warp ends and floats over four threads. The fabric has 144 filling yarns per inch.

After importation, plaintiff, a textile coverter, dyes, naps and imparts a water repellent finish to the fabric, which is then sold for use in the manufacture of outerwear garments.

The parties differ, in the first instance, over whether the imported merchandise is of velveteen construction, plaintiff claiming that a filling pile fabric with only 144 filling yarns per inch lacks the requisite density to be a "velveteen" within the meaning of item 346.15.

The heart of the issue, however, is whether a greige filling pile fabric with uncut filling floats or pile can be a "pile fabric" within the intendment of the pile fabric provisions and their governing heading.

It is plaintiff's contention that a pile fabric is one which has a pile formation, consisting of yarns in cut or loop form, projecting from the surface, albeit covering only part of the surface; that a velveteen woven fabric, by virtue of its construction, does not have a pile formation until the extra filling yarns, viz., pile picks or filling floats, are cut in the finishing process; and that inasmuch as a greige velveteen, in its condition as it comes off the weave loom, lacks the requisite pile effect it is not a pile fabric within the ambit of the tariff schedules. Hence, even if the imported cloth were considered to be a greige velveteen, plaintiff's contention is that it is not a pile fabric since it does not have a pile.

Thus, plaintiff's witness, Burr, testified that velveteen in the griege condition is not a pile fabric in that the filling floats have not been cut to produce a pile on the surface, but that it is "potentially" a pile fabric as the floats can be cut to form the pile. In this connection, he stated on direct examination (R. 43–44).

> Q. * * * You stated that an example of a cut weft pile fabric or filling pile fabric is a velveteen or corduroy. Would you consider a velveteen or corduroy as a pile fabric if it is uncut?
>
> A. No, it has no pile and, therefore, until it has been subsequently processed, it is simply greige goods and cannot be properly classified as a pile fabric.
>
> Q. Why doesn't it have a pile?
>
> A. Because the yarns of the fabric run parallel to the surface of the fabric. There are no projecting fibers, yarns, loops, from the surface of the fabric.
>
> Q. Is a warp pile fabric, such as you have mentioned, considered to be a pile fabric if the loops are uncut?
>
> * * * * * * *
>
> A. Well, in the case of a warp pile fabric, by its definition and method of manufacture, the pile is cut, as in the case of velvet,

coming from the loom, and it is already a pile fabric. The terry cloth, with its loops projecting from the surface, is already a pile fabric because it has loops of yarns projecting from the surface of the fabric.

Q. Is terry a cut or uncut pile?

A. It can be either.

Upon questioning by the court, Burr added (R. 47–48):

JUDGE MALETZ: Now, in the greige condition, did I understand, from your testimony, that in that type of situation, the velveteen can be either a pile fabric or a non-pile fabric?

THE WITNESS: Well, it is potentially a pile fabric, but it isn't until the pile has been made by cutting of the filling yarns. The question is one of timing at that moment. It is not a pile fabric in the greige, but it can be subsequently processed to become a pile fabric.

Defendant's position, however, is that it is the weave or construction of a fabric which makes it a pile fabric; that the insertion of a pile pick or extra filling yarn in filling pile fabric during the weaving process creates a pile which has not been cut; and that the subject merchandise "is within the common meaning of the term *uncut velveteen filling pile fabric* as that term is used in the Tariff Schedules." (Defendant's brief p. 18, emphasis in original.)

In support of this position, defendant's witnesses testified that it is the weave which determines whether a fabric is a velveteen and that plaintiff's exhibit 1, a representative sample of the imported merchandise, is a velveteen because of its construction. They variously described the woven uncut cloth that comes off the loom as "greige uncut velevteen," "uncut velveteen" or "greige velveteen," and agreed that it would be considered an uncut pile fabric in which the pile is not cut or which can subsequently be cut to produce a pile fabric.

Thus, defendant's witness Gray testified on direct examination (R. 140–142):

Q. When velveteen is manufactured and it comes off the loom, would you consider it to be a pile fabric?

A. Yes.

Q. Why would you consider it to be a pile fabric?

A. Because it has, as in number one and five [the numbered yarns shown on the illustrative diagrams on exhibit B], foundation binder picks, and some form of combination of two, three, and four, which are pile picks.

Q. Could it be considered an uncut pile fabric?

A. Yes.

Q. Can a velveteen subsequently be cut to produce a cut pile fabric, a cut pile fabric?

A. Yes.

Q. Have you had an opportunity to examine Plaintiff's Exhibit 1?
A. Yes.

* * * * * * * * *

Q. Based upon your experience and your examination of Plaintiff's Exhibit 1, do you have an opinion as to whether Plaintiff's Exhibit 1 constitutes an uncut plainback velveteen pile fabric?
A. It does.

Gray also stated that plaintiff's exhibit 1 has a pile composed of loops which he pointed out to the court by inserting a needle under several filling floats and raising them slightly. It was his opinion that plaintiff's exhibit 1 is a "loop" pile fabric (R. 180), but that if the loops were cut the fabric would be called a "cut velveteen" (R. 144). A loop, he testified, could be "projecting upward" even if it "lay horizontally flat" (R. 186), apparently so long as it had "air space" around it and a needle could be inserted into the fabric underneath it (R. 188–190).

This view as to the existence of a pile was not, however, shared by defendant's other witnesses. For example, while defendant's witness Lowe testified that plaintiff's exhibit 1 is a velveteen because of its construction and that it had "pile picks inserted during weaving" (R. 231) which could be subsequently cut so that the end result would be a cut pile fabric or cut velveteen, he distinguished between "pile pick" and "pile" on cross-examination, as follows (R. 245–246):

> A pile pick is the pick inserted in a fabric when it is being woven, which floats enough so that after the cloth has eventually been completely woven, and during the finishing process, can be cut. At this state, it becomes pile.

Elaborating on this aspect, Lowe continued (R. 255):

> Pile is the effect one obtains from cutting pile picks and then brushing them so that the picks are put in basically perpendicular manner on the surface of the cloth.

Defendant's witness Siegel testified that a velveteen is a fabric that can be processed to make a "pile tuft fabric" (R. 273). With respect to plaintiff's exhibit 1, Siegel then testified as follows upon questioning by the court (R. 279–282):

> JUDGE MALETZ: Now, what is there in this fabric which causes you to say—not causes you—what characteristic does Plaintiff's Exhibit 1 have which, in addition to being a velveteen, constitutes it a pile fabric?
>
> THE WITNESS: It is capable of being cut. It *could not be a pile fabric, as such, until it is cut.* It is an uncut pile fabric at that point. It doesn't become a pile—and my definition of a pile would

be a pile when a knife is inserted and cuts this loop. [Emphasis added.]

JUDGE MALETZ: Are you saying then that in this particular condition—are you saying then that Plaintiff's Exhibit 1 is capable of becoming a pile fabric after it is cut? Is that your testimony?

THE WITNESS: It is an uncut pile fabric in the state that it is at. There is no—pile has to stand up, in my understanding of pile. So, it cannot be a pile. It is uncut pile or raw material for a pile until this is cut.

JUDGE MALETZ: What I would like to know is this: Is this presently, forgetting about it has not been cut—is this now, in this condition, a pile fabric?

THE WITNESS: If you will allow me to say uncut pile, the answer is yes.

* * * * * * *

JUDGE MALETZ: Do you refer to this as pile fabric in the trade?

THE WITNESS: I have not referred to it, no, sir.

JUDGE MALETZ: Very well. How do you refer to it?

THE WITNESS: We would call it an uncut velveteen.

In response to further questioning from the court, Siegel testified as follows (R. 289):

JUDGE MALETZ: In the trade, as you understand it, would the fabric like Plaintiff's Exhibit 1 be referred to as a pile fabric? I think you have already answered the question.

THE WITNESS: The answer is yes.

JUDGE MALETZ: Would you refer to it as a pile fabric?

THE WITNESS: We would call it uncut pile, but we would—

JUDGE MALETZ: You would call it uncut pile?

THE WITNESS: Yes.

JUDGE MALETZ: Would you call it pile fabric? That is my question.

THE WITNESS: The answer is no, sir.

BY MR. SILVERMAN: (Cont'g)

Q. May Plaintiff's Exhibit 1 be properly characterized a pile fabric in which the pile is not cut?

A. It is.

Q. May it be properly characterized an uncut or not cut velveteen?

A. It is.

Subsequently, Siegel testified that plaintiff's exhibit 1 is a "pile fabric" with a "raised filling pile" (R. 294) composed of a "flat loop" (R. 302).

Defendant's fourth witness, Lutzer, testified that plaintiff's exhibit 1 is a velveteen pile fabric and defined "pile" as a "raised portion * * * of a base fabric" (R. 349). When asked on cross-examination if plaintiff's exhibit 1 had any short projecting ends, he responded

"I don't know" (R. 352). He stated that plaintiff's exhibit 1 is a pile fabric because it has a "pile construction," the pile consisting of the "extra filling yarns" (R. 359).

IV

Against this background, we turn first to the heading set forth, *supra*, governing the pile fabric provisions in subpart A of part 4, schedule 3. The heading limits the scope of these provisions to pile fabrics in which the pile was inserted or knotted during the weaving or knitting, but includes all such fabrics whether or not the pile covers the entire surface and whether the pile is wholly or partly cut or is not cut.

It is not disputed that the first part of the heading refers to the pile picks or extra filling or warp threads which are inserted during the weaving of the fabric. However, as indicated from the foregoing summary of the record, the parties ascribe different meanings to the latter portion of the heading, plaintiff claiming that it plainly requires the existence of a raised pile, which may be wholly or partly cut or not cut (i.e., in loops) upon the surface of the fabric, and defendant contending that it unquestionably refers to the pile pick or filling float inserted in the fabric, whether or not the float is cut or raised from the fabric surface.

Both parties cite various lexicographic and textile authorities as sources for the common meaning of the terms "pile," "pile fabric" and "velveteen," and reply upon judicial decisions of the court and opinions of the Board of General Appraisers construing various predecessor pile fabric provisions to support their respective positions.

It is fundamental that, in the absence of contrary legislative intent, the common meaning of a term controls in construing the tariff statutes, and that common meaning is a matter of law to be determined by the court, E.g., *United States* v. *O. Brager-Larsen*, 36 CCPA 1, 3, CAD 388 (1948). To this end, the court may consult extrinsic sources such as dictionaries and authorities. Further, faced as we are here with conflicting interpretations of the governing tariff heading, and finding that the disputed language is not without ambiguity, it is appropriate to resort to the legislative history to determine the Congressional intent which is the primary purpose of statutory construction. *United States* v. *Durst Mfg. Co., Inc.*, 46 CCPA 74, CAD 700 (1959); *United States* v. *J. Eisenberg, Inc.*, 43 CCPA 105, CAD 616 (1956).

The term "pile fabrics" was first used in the enumeration of dutiable merchandise in the Tariff Act of 1890, appearing under the cotton, wool and silk schedules in paragraphs 350, 396 and 411,

respectively, and was employed in paragraphs 259 and 299 of the cotton and silk schedules in the Tariff Act of 1894.[5]

The phrase "cut or uncut" was subsequently added by Congress in the Tariff Act of 1897 to the cotton (vegetable fiber) and silk pile fabric paragraphs and a provision was added for flax pile fabrics.[6]

The phrase "whether or not the pile covers the entire surface" was added by paragraphs 325 and 353 of the Tariff Act of 1909 to the cotton (or other vegetable fiber except flax) and flax provisions. The term "cut or uncut" was retained in the provision for silk pile fabrics (paragraph 399) which distinguished between velvets and plushes on the basis of "the length of the pile." [7]

In the Tariff Act of 1913, the cotton provision (paragraph 257) and the flax, hemp and ramie pile fabric provision (paragraph 280) retained the added language of their predecessor provisions; two provisions, covering pile fabrics of wool and of animal hair (paragraphs 288 and 309), using the phrases "cut or uncut" and "whether or not the pile covers the entire surface" were added to the dutiable sched-

[5] Paragraph 259 of the Tariff Act of 1894 provided for—

Plushes, velvets, velveteens, corduroys, and all pile fabrics composed of cotton or other vegetable fiber, not bleached, dyed, colored, stained, painted, or printed, * * *.

Paragraph 299 of this act provided for—

Velvets, chenilles, or other pile fabrics, composed of silk, or of which silk is the component material of chief value, * * * plushes, composed of silk, or of which silk is the component material of chief value, * * *.

[6] Paragraph 315 of the 1897 act provided for—

Plushes, velvets, velveteens, corduroys, and all pile fabrics, cut or uncut; any of the foregoing composed of cotton or other vegetable fiber, not bleached, dyed, colored, stained, painted, or printed, * * *,

and paragraph 386 of this act covered—

Velvets, velvet or plush ribbons, chenilles, or other pile fabrics, cut or uncut, composed of silk or of which silk is the component material of chief value, * * * plushes * * *.

Paragraph 342 provided for—

All pile fabrics of which flax is the component material of chief value, * * *.

[7] Paragraph 325 provided for—

Plushes, velvets, velveteens, corduroys, and all pile fabrics, cut or uncut, whether or not the pile covers the entire surface; any of the foregoing composed of cotton or other vegetable fiber, except flax, * * *.

and paragraph 353 covered—

All pile fabrics, whether or not the pile covers the entire surface, composed of flax, or of which flax is the component material of chief value, * * *.

Paragraph 399 provided for—

Velvets, chenilles, and other pile fabrics, not specially provided for in this section, cut or uncut, composed wholly or in chief value of silk, * * *. Plushes, cut or uncut, composed wholly or in chief value of silk, * * *. The distinction between "plushes" and "velvets" shall be determined by the length of the pile; those having pile exceeding one-seventh of one inch in length, to be taken as "plushes;" those having pile one-seventh of one inch or less in length, shall be taken as "velvets." The distance from the end of the pile to the bottom of the first binding pick shall be considered as the length of the pile. * * *

ules; and paragraph 314, the silk pile fabric provision, was in large part revised, omitting, among others, the phrase "cut or uncut." [8]

The provisions of the 1913 act were revised by the Tariff Act of 1922 which, in accordance with the intent stated in the *Summary of Tariff Information, 1921*,[9] to "secure uniformity" in the pile fabric provisions, used the identical phrasing, "cut or uncut, whether or not the pile covers the whole surface," in the cotton, vegetable fiber (other than cotton) and wool pile fabric paragraphs (910, 1012 and 1110).[10]

It is significant that, consistent with the stated purpose of achieving uniformity in the classification of pile fabrics, regardless of their component materials, the *1921 Summary* uses substantially the same descriptive language in explaining the scope of each of these provisions. Thus, the sections on cotton, vegetable fiber (other than cotton) and wool pile fabrics all state that: "Pile fabrics consist of a foundation

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[8] The pile fabric provisions of the 1913 act read as follows [emphasis added]:

Par. 257. Plushes, velvets, plush or velvet ribbons, velveteens, corduroys, and all pile fabrics, *cut or uncut, whether or not the pile covers the entire surface;* any of the foregoing composed wholly or in chief value of cotton or other vegetable fiber, except flax, hemp, or ramie; * * *.

Par. 280. All pile fabrics, *whether or not the pile covers the entire surface*, composed of flax, hemp, or ramie, or of which flax, hemp, or ramie is the component material of chief value, * * *.

Par. 288. * * * plushes, velvets, and all other pile fabrics, *cut or uncut*, woven or knit, *whether or no the pile covers the entire surface*, made wholly or in chief value of wool, * * *.

Par. 309. Plushes, velvets, and all other pile fabrics, *cut or uncut*, woven or knit, *whether or not the pile covers the entire surface*, made wholly or partly of the hair of Angora goat, alpaca, or other like animals, and articles made wholly or in chief value of such plushes, velvets, or pile fabrics, * * *.

Par. 314. Velvets, plushes, chenilles, velvet or plush ribbons, or other pile fabrics composed of silk or of which silk is the component material of chief value, * * *.

[9] The *1921 Summary* was prepared by the Tariff Commission for the Senate Committee on Finance in connection with its study of H.R. 7456, subsequently enacted as the Tariff Act of 1922. It states, with respect to the proposed provision for pile fabrics of vegetable fiber other than cotton, enacted as par. 1012, that the phrase "cut or uncut" was introduced "to render the provision in this schedule as nearly uniform as possible with the corresponding provision in the cotton schedule" (p. 925), and notes in connection with the provision enacted as par. 1110 (p. 979) that—

The manufacture of pile fabrics forms a distinct branch of the textile industry and for this reason, and to secure uniformity with pile fabric provisions (pars. 909 and 1011) in other textile schedules, a special paragraph is here devoted to pile fabrics and manufactures thereof, falling under the wool schedule. * * *

[10] The pile fabric provisions in the 1922 act read as follows:

Par. 910. Pile fabrics, composed wholly or in chief value of cotton, including plush and velvet ribbons, cut or uncut, whether or not the pile covers the whole surface, * * *.

Par. 1012. Pile fabrics, composed wholly or in chief value of vegetable fiber other than cotton, cut or uncut, whether or not the pile covers the whole surface, * * *.

Par. 1110. Pile fabrics, cut or uncut, whether or not the pile covers the whole surface, made wholly or in chief value of wool, * * *.

The silk pile fabric provision, par. 314, was unchanged. It provided for—

Velvets, plushes, chenilles, velvet or plush ribbons, or other pile fabrics, composed of silk or of which silk is the component material of chief value, * * *.

cloth covered in whole or in part by *short projecting ends or loops* made with an extra set of threads." [Pp. 874, 924, 978; emphasis added.]

The section in the *1921 Summary* on cotton pile fabrics also observes (p. 874):

> * * * In the case of velveteen and corduroy this extra set of threads consists of filling whereas in the case of velvet and plush it consists of warp. *Filling piles are always cut whereas warp piles may be either cut or loop* (*uncut*). Terry-woven fabrics are made by a different method from that used for other pile fabrics and usually have uncut loops on both sides of the cloth. [Emphasis added.]

Further, the section on pile fabrics of vegetable fiber other than cotton states (p. 924), that—

> * * * Pile made of flax, hemp, ramie, jute, etc., lacks the resilience of pile made of cotton, mohair, or silk, and *when pressed down does not readily revert* to its upright position; * * *. [Emphasis added.]

The section on silk pile fabrics states that these fabrics (p. 1027)—

> * * * include cloths and ribbons composed of a woven ground of silk or other material more or less completely concealed by a covering of short silk threads, or pile, *which project from it as cut ends or, in a few fabrics, as loops.* Silk pile cloths are mainly velvets and plushes, which differ principally in that the pile of velvet is the shorter. * * * [Emphasis added.]

It is also noted that the earlier *Summary of Tariff Information, 1920*, states, in the section on cotton pile fabrics, at pp. 409–410 that pile fabrics—

> * * * are distinguished from all other woven articles by their surface, which shows a *series of short ends or loops issuing from the cloth and usually concealing the interlacing of the warp and filling.* They are two kinds—warp piles made with two warps and one filling, producing velvet and plush; and filling piles made with two fillings and one warp, producing such goods as velveteen and corduroy.
>
> Pile fabrics may be plain or figured, commonly the former, and either cut or uncut. Warp-pile fabrics permit of a greater variety of effects and are the most extensively used. Terry-woven cloths are *uncut loop-pile fabrics* made without the aid of wires. * * * [Emphasis added.]

The point of the foregoing recital of these early tariff provisions and the *1920* and *1921 Summaries* is that they demonstrate beyond a doubt that by 1921, a pile fabric, regardless of its component materials, was considered for tariff purposes to be one which had a pile projecting from the surface of the ground fabric in the form of short ends or loops.

It may be noted that prior to the revisions in 1909 to the pile fabric provisions, the courts and the Board of General Appraisers, in relying upon commercial testimony, had construed the term "pile fabrics" to be limited to goods which had a pile that covered the entire surface of the fabric. What is more significant, in view of the issue raised herein, is that, with one exception referred to in note 11 *infra*, the term was limited to fabrics which had a *raised* pile on their surfaces.

In *McGibbon & Co.* v. *United States*, T.D. 17638–G.A. 3686 (1896), the Board of General Appraisers held that goods that had a raised pile covering only one-half the surface of the fabrics were dutiable as silk pile fabrics under paragraph 299 of the Tariff Act of 1894. The circuit court reversed, 107 Fed. 265 (S.D.N.Y. 1900), holding the goods to be dutiable as manufactures of silk, stating (ibid.):

> * * * Inasmuch as the fabric as a whole is not substantially a pile fabric, and is not commercially known as such, the fact that a portion thereof has a pile surface is not sufficient to constitute it a pile fabric.

The circuit court of appeals affirmed the lower court *per curiam*. See *United States* v. *McGibbon*, 113 Fed. 1021 (2d Cir. 1902).

The *McGibbon* holding was followed in *W. & J. Sloane* v. *United States*, 7 Treas. Dec. 277, T.D. 25037 (1904), involving silk and metal fabrics having a partially raised pile surface which were assessed under the Tariff Act of 1897; and in *McGibbon & Co.* v. *United States*, 7 Treas. Dec. 595, T.D. 25197 (1904), involving silk and cotton fabrics with strips of raised pile upon the face of the goods, which were also assessed under the 1897 act. See also *H. Robinson* v. *United States*, 9 Treas. Dec. 426, T.D. 26149 (1905); and *Stroheim & Romann* v. *United States*, 9 Treas. Dec. 990, T.D. 26447 (1905).

The addition in the 1909 revisions of the cotton and flax provisions of the phrase "whether or not the pile covers the entire surface" limited the effect of the 1897 *McGibbon* holding. However, failure to include this language in paragraph 399, which provided for silk "velvets, chenilles, and other pile fabrics * * * cut or uncut," was contended by the government, in *United States* v. *Schumacher & Co.*, 3 Ct. Cust. Appls. 301, T.D. 32586 (1912), to be demonstrative of Congressional intent that paragraph 399 included only goods that had an "erect pile" upon their entire surface. *Schumacher*, it is to be noted, involved goods composed in chief value of silk having in part a pile surface that were classified by the collector as woven fabrics in the piece under another provision of paragraph 399 on the ground that they were not pile fabrics. The importers protested, claiming that the goods were classifiable as velvets. The appellate court, noting that the

goods, unlike those in *McGibbon*, were almost entirely covered with pile and that the importers had established that the goods in question had been commercially known as pile fabrics for over 30 years, affirmed the decision of the Board of General Appraisers sustaining the protest. Following *Schumacher*, similar decisions were reached by the Board with respect to silk fabrics assessed under the Tariff Act of 1913. See *L. E. Stirn* v. *United States*, 29 Treas. Dec. 165, Abs. 38279 (1915) and *Francois Coste* v. *United States*, 30 Treas. Dec. 1151, Abs. 39907 (1916).

In *M. J. Corbett & Co.*, v. *United States*, 26 Treas. Dec. 970, T.D. 34545 (1914), the Board held that certain cotton "terry cloth," which it stated (p. 971) was woven,

> * * * in such a manner that one face of the goods is practically covered with closely placed loops of thread which issue from the body of the fabric at right angles thereto. * * *

was an "uncut pile fabric" and properly classified as such under paragraph 325 of the Tariff Act of 1909. Referring to the trade testimony bearing on the meaning of the term "pile fabrics," the Board stated (pp. 971–972):

> * * * From the definitions given, it is clear that the term is not used in trade and commerce in any different manner than it is in common speech. As ordinarily understood, a pile fabric is a fabric in which a soft covering or nap overspreads and conceals to a great extent the interlacing of the warp and filling threads. *This nap is formed by a series of threads which issue from the body of the fabric at right angles.* In some fabrics the nap or pile is in the form of a series of loops, such as we find in Brussels carpet, while in others the ends of the threads are cut or sheared off smoothly so as to form a uniform and even surface, presenting the ends of the fiber to the eye, as is ordinarily found in velvets, velveteens, plushes, velours, etc.[11] [Emphasis added.]

The *Corbett* holding was followed in *C. A. Haynes & Co.* v. *United States*, 30 Treas. Dec. 790, T.D. 36403 (1916), with the Board citing the statement in the earlier case that pile fabrics required two systems of warp or filling threads, and commenting (p. 792):

> The reason for this is that, in order to produce the *effect known as the pile fabric*, including velvets, plushes, and astrakhans, this

[11] It is noted that a prior decision of the Board, in *Velutina Bias Company* v. *United States*, 2 Treas. Dec. 169 T.D. 21454 (1899), holding certain unbleached uncut cotton cloth to be properly classifiable as "velveteen uncut" under paragraph 315, Tariff Act of 1897, is in conflict with the holding in *Corbett* and other cases cited herein. The merchandise in *Velutina* had, in fact, been classified as uncut *velvet* under that paragraph but the Board held it to be an uncut *velveteen*. The facts upon which the Board relied are unclear and confusing. The testimony elicited showed that the fabric was imported for conversion into cotton *velvet* and for subsequent conversion into a bias *velveteen*. However, it is not stated whether the extra set of threads was warp or filling. The court found that the cloth was woven especially to be cut and made into a velveteen.

We do not find this opinion to be of assistance to the government's case in light of the later decisions which we discuss below.

> extra and distinct set of warp or filling threads is required. [Emphasis added.]

Also, in *Naday & Fleischer* v. *United States*, 34 Treas. Dec. 677, Abs. 42032 (1918), involving certain cotton dress goods classified as pile fabrics under paragraph 257 of the Tariff Act of 1913, the Board stated (p. 677):

> * * * The cloth is plain woven but the warp threads are of two sizes. The heavy threads which lie about one-eighth of an inch apart were formed into a loop at intervals of about a quarter of an inch and the tops of the loops have been clipped, leaving the raw edges loose. *These loose ends do not extend at right angles from the body of the fabric forming a nap*, as did the so-called pile threads in the case of M. J. Corbett & Co. (G.A. 7572, T.D. 34545), and, following the rule laid down in that case, we find the goods are not pile fabrics. * * * [Emphasis added.][12]

Of special significance is the construction placed by our appellate court in *Knauth, Nachod & Kuhne* v. *United States*, 6 Ct. Cust. Appls. 128, T.D. 35389 (1915) upon the phrase "cut or uncut" in paragraph 325 of the Tariff Act of 1909, providing (among other things) for cotton pile fabrics. The imported merchandise, consisting of imitation mohair astrakhans composed of jute and cotton, with a closely curled looped pile on the face of the fabric, was assessed under this provision and claimed to be dutiable as manufactures in chief value of cotton or of vegetable fiber.

The court cited dictionary definitions of "pile weaving," "pile" and "pile fabric," and noted (at pp. 129–130) that "pile fabric" was defined in *Knight's American Mechanical Dictionary* as—

> One in which a looped weft is formed by wires, to be afterwards cut, as in velvet and in Wilton carpet, or left in loops, as in Brussels carpet.

The court then stated that the merchandise would be called a pile fabric within these definitions unless it were found that the term was used in a different sense in the tariff statutes. The court observed that astrakhans had formerly been held not to be classifiable as pile fabrics under the Tariff Act of 1890, because they were not so classed within the commercial understanding, and commented thereon as follows (at pp. 130–131):

> It may be noted that this commercial understanding was apparently based upon the view that to constitute a pile fabric as commercially known it must present an appearance similar

[12] See also *Sherman & Sons Co.* v. *United States*, 37 Treas. Dec. 187, T.D. 38188 (1919), involving fancy striped voiles and dotted marquisettes which were held to be properly classifiable as cotton cloth rather than as pile fabrics under the Tariff Act of 1913.

to that of plushes and velvets. In other words, that the loops must have been cut.

But in the later statutes, including the one in 1909, here under consideration, the language of the statute is different from that of 1890, and so far from indicating an adoption of the judicial interpretation placed upon the term "pile fabric" * * * the Congress enlarged the term * * *.

* * * * * * *

It is suggested, however, in this case that the evidence shows that this fabric is not capable of being cut, and that for this reason it should be held excluded from the paragraph. We do not think its susceptibility of being cut is essential. Congress evidently had in mind *two classes of pile fabrics, one of which is cut and presents a surface similar to velvet and plush, the other like astrakhan or Brussels carpet, which present a loop surface.* To distinguish between two classes the words "cut or uncut" were used, and the use of these words plainly includes all such as are uncut as well as those which are cut. * * * [Emphasis added.]

It is patent from the court's exemplars of *uncut* pile fabrics, i.e., those which have a "loop surface," that it had in mind fabrics with a raised pile.[12]

The 1922 tariff act was succeeded by the Tariff Act of 1930 which made minor changes in the pile fabric provisions and added another to cover pile fabrics of rayon or other synthetic textiles. Thus, paragraph 909 provided for cotton pile fabrics "cut or uncut, whether or not the pile covers the entire surface," and paragraphs 1012, 1110, 1206 and 1307 provided, respectively, for vegetable fiber (other than cotton), wool, silk, and rayon or other synthetic textiles, pile fabric "whether or not the pile covers the entire surface * * * if the pile is wholly cut or wholly uncut * * * [or] if the pile is partly cut."

It does not appear that any changes were intended in the 1930 act in the meaning of the term "pile fabrics," as evidenced by the comments in the *Summary of Tariff Information, 1929*, which was prepared for Congressional use in updating the 1922 act. The *Summary* describes pile fabrics in language markedly similar to that employed in the earlier editions. And using identical language in the sections on the cotton, vegetable fiber (other than cotton) and wool pile fabric provisions it describes pile fabric at pages 1572, 1644, and 1705 as consisting of a—

* * * foundation cloth covered in whole or in part by short projecting ends or loops produced in the weave with an extra set of threads. * * *

[12] It is noted that the *Knauth* and *Corbett* decisions were cited in the *Summary of Tariff Information, 1920*, pp. 410-411.

The section on silk pile fabrics states (p. 1765):

> *Pile fabrics are distinguished from all other woven fabrics by their surface, which is covered in whole or in part by a series of short ends or loops projecting from the body of the cloth* and usually concealing the interlacing of the ground warp and filling. These fabrics are known as "cut" or "loop" (uncut) piles, according as the loops have been cut or left as woven. [Emphasis added.

The foregoing demonstrates that pile fabrics were defined not only in terms of their weave, but of the type of pile "projecting" from the surface of the fabric.

It is worthy of note that this court had occasion to construe the wool pile fabric provisions of the 1922 and 1930 acts in *British & Irish Woolens Corp.* v. *United States*, 65 Treas. Dec. 668, T.D. 47009 (1934), which involved certain wool cloth known as "Montagnac"—a fabric which was produced in the weave with an extra set of filling threads, some of which had been raised and severed by a napper that produced a "hairiness" on the surface of the fabric. The merchandise was assessed as a woven fabric under the 1922 and 1930 acts, depending upon the date of entry, on the ground that the fabric surface had a "nap," not a "pile" and hence was a "napped" rather than a "pile" fabric. The importer protested, claiming that the structure of the cloth and the napping were sufficient to bring the goods within the classification of "pile fabrics."

The court found little difference between the terms "nap" and "pile," stating (pp. 670, 672):

> The terms "nap" and "pile" as applied to the result seem to be practically identical and such differences between the "hairiness" of "napped fabrics" and the "hairiness" of "pile fabrics", which the terms "nap" and "pile" seem intended to connote, are not fundamental differences in the product but in the method of production. Both terms designate a "hairiness" on the surface of woven fabrics which in some cases, as has been demonstrated at the instant trial, are so much alike that even an expert of 35 years' experience admitted that he could not be sure whether the cloth here in question was a "napped" or a "pile" fabric without an analysis.
>
> * * * * * * *
>
> This difference in the method of production is, as we have already outlined from our understanding of the conflicting testimony, that what is termed a "nap" or "napped fabrics" is produced by the *raising of some of the fibers of the threads* which compose the basic fabric, whereas the "pile" on "pile fabrics" must *be the raising at intervals, in the form of loops*, the entire thickness of extra threads introduced into, but not essential to the basic fabric, which thus form an "uncut pile." These loops if cut then form a "cut pile." [Emphasis added.]

Although the testimony indicated that not all of the extra filling threads were raised by the napper, or cut, the court found, by virtue of the provision in the 1930 act covering pile "partly cut," that it was unnecessary for all the extra threads to be so rasied or cut. Concluding that the fabric in issue conformed to the requirements set forth in *M. J. Corbett & Co.* v. *United States, supra*, 26 Treas. Dec. 970, in that the goods were napped or teasled and had the weave structure described in the former case, the court held the cloth to be classifiable as pile fabric.

The decision of this court in *British & Irish Woolens Corp.* was affirmed in *United States* v. *British & Irish Woolens Corp.*, 22 CCPA 658, T.D. 47635 (1935). There, the appellate court, noting the testimony of some government witnesses that a "true" pile is made only by cutting the extra threads with a knife, and not by tearing them with a napper, stated (p. 663)—

> We find no authority which would seem to justify a holding that, as a matter of law, to create a true pile, a knife must be used for cutting the threads. If a *pile is actually created* it would not seem to be of any legal consequence what instrument is used in performing the cutting operation. [Emphasis added.]

The import of this decision is unmistakable: if a hairlike surface or nap is produced on the face of the cloth, then, regardless of how it was produced, the fabric meets one of the two requisites—the other being the specified pile weave structure—for classification as a pile fabric.

Applying these two criteria to *velveteen* fabrics, it is evident that they are not met *unless and until* the filling pile threads have been cut to form the pile on the surface of the fabric. Thus, the *Summary of Tariff Information, 1929*, states in part (p. 1572):

> * * * Technically, pile fabrics are divided according to method of construction into two classes: (1) Filling piles, such as velveteen and corduroy, and (2) warp piles, such as velvet, plush, and terry-woven fabrics. In all cases the foundation fabric requires its own set of warp and filling threads, and the pile, whether warp or filling, is made from an additional set of threads. *Filling pile is always cut*, whereas warp pile may be either cut or loop (uncut). [Emphasis added.]

Similarly Vol. 9 of the *Summaries of Tariff Information, 1948*, prepared by the Tariff Commission in response to a directive from the Ways and Means Committee [14] to "rewrite or otherwise bring up to date * * * the commodity summaries of tariff information," describes cotton velveteens as [15]—

[14] Resolution of July 25, 1947 referred to in *Summaries*, Vol. 9, p. III.
[15] Id. at p. 70.

> * * * filling-pile fabrics in which part of the filling *is cut to form a pile* which spreads uniformly *over the entire surface of the fabric*. * * * [Emphasis added.]

It is also signi cant that Vol. 13 of the *1948 Summaries* states, in the section on rayon pile fabrics (p. 66):

> Pile fabrics differ from other woven fabrics in having their surface covered in whole or in part by *short projecting ends* or loops. Fabrics distinguished by a *wholly cut pile* have their surface *covered with short erect threads*, the height of which is one-seventh of an inch or less in velvets and over one-seventh of an inch in plushes. Fabrics characterized by a *wholly uncut pile* have their surface *covered with small loops*. Those with a *partly cut pile* are mainly jacquard-figured goods and other novelties wherein patterns are worked out by a *combination of erect pile and loop pile*. [Emphasis added.]

And in the section of the *1948 Summaries* on wool pile fabrics (Vol. 11, Part 2, p. 49) the following is stated:

> Pile fabrics consist of foundation or ground fabrics *on which the pile is formed by short projecting yarn-ends* (*if cut pile*) *or loops* (*if uncut pile*). The pile, made from an extra set of yarns, may consist either of filling yarns, as in corduroy, or of warp yarns, as in plush, frieze, and Astrakhan. *Filling pile is always cut;* warp pile may be cut, partly cut, or uncut. [Emphasis added.]

We cite the *1948 Summaries*, not as evidence of legislative intent in enacting the pile fabric provisions in the Tariff Act of 1930, but as demonstrating a consistency over many years in the treatment and understanding of the term "pile fabrics" by the Tariff Commission which has been periodically charged by Congress with the responsibility of preparing the commodity surveys and summaries upon which the latter has relied in revising the tariff statutes.

Turning now to the Tariff Schedules of the United States and the provisions in issue, we are unable to discern any intent in the revised tariff schedules adopted under the Tariff Classification Act of 1962 to change the understanding of the term "pile fabrics" as expressed in the foregoing legislative history and judicial decisions.[16] We find

---

[16] The *Tariff Classification Study—Explanatory and Background Materials, Schedule 3* (Nov. 15, 1960) merely indicates an intent to consolidate all of the pile fabric provisions with some minor rate changes. It states (p. 129):

> Items 346.05 through 346.65 cover pile fabrics, that is, fabrics in which the pile was inserted or knotted during the weaving or knitting, whether or not the pile covers the entire surface, and whether the pile is wholly or partly cut or is not cut. The only rate changes involved in connection with pile fabrics are those reflected in item 346.35 covering velvets, plushes, and velours, all of which have been brought together at the single rate of 35 percent ad valorem. These products are closely related and differ significantly only as to the height of the pile.

rather that the heading in question incorporates the previously defined standards for classification of pile fabric: (1) construction, i.e., insertion or knotting of the intended pile (extra warp or filling thread) in the fabric during the weaving or knitting, and (2) a pile effect or formation which at least partly "covers the * * * surface" and which may be wholly or partly cut or not cut (in loops).

Therefore, in light of these standards, unless or until the pile picks or filling floats of an uncut velveteen greige cloth are cut to form the pile on the face of the fabric, it is not a pile fabric within the ambit of the pile fabrics heading and is precluded from classification thereunder as "velveteen."

Beyond these considerations, we note that generally the definitions given in the lexicons and textile authorities comport with our understanding of the terms "pile," and "pile fabrics" and "velveteen" as used in the tariff schedules. Thus, in Hollen and Saddler, *Textiles* (3d ed., 1968), a source cited by defendant, the following appears at pp. 161–162:

> Pile fabrics are three-dimensational fabrics that have yarns or fibers forming a dense cover of the ground fabric. * * *
>
> * * * * * * *
>
> Woven pile fabrics are three-dimensional fabrics made by weaving into the basic structure an extra set of warp or filling yarns to make loops or cut ends on the surface. Pile fabrics are classified by the set of yarns used to form the pile, as filling pile and warp pile fabrics. (See Figure 19–2.)
>
> Filling Pile Fabric
>
> This fabric is made with three sets of yarns. An extra set of filling yarns forms the pile. During weaving, extra yarns float across the ground weave. In *corduroy*, the floats are arranged in lengthwise rows; in *velveteen*, they are scattered over the base fabric. The floats are cut by a special machine consisting of guides that lift the individual floating yarns from the ground fabric and of revolving knives that cut the floats. (See Figures 19–3 and 19–4.) * * * [17]

Also noted are the following definitions cited by defendant, from *Webster's Third New International Dictionary* (2d ed., 1963):

> *pile* – a mass of raised loops or tufts covering all or part of a fabric or carpet that is formed by extra warp or weft yarns during the weaving and that produces a soft even compact furry or velvety surface.
>
> *velveteen* – a clothing fabric usu. of cotton in twill or plain weaves made with a short close weft pile in imitation of velvet.

[17] Fig. 19–4 is a diagram of a machine for cutting corduroy.

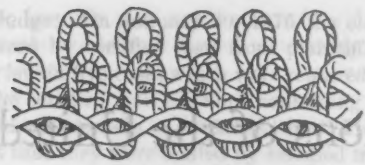

Fig. 19–2. Woven pile fabric.

Fig. 19–3. Filling pile. Floats are cut.

Turning now to the merchandise in issue, the court has examined plaintiff's exhibit 1 to determine if it has a pile within the meaning of the tariff schedules.[18] We find, despite the testimony of defendant's witness Gray, no evidence of a "pile," that is, raised short ends or loops projecting from the ground fabric—only uncut, flat filling floats which lie horizontally on and are interlaced with the ground weave.

Inasmuch as the imported merchandise lacks the requisite pile formation on its surface, it is not a "pile fabric" nor, to be more specific, a "velveteen" as provided for in item 346.15, TSUS.

In view of our holding, we need not reach the second issue raised by plaintiff, namely, whether the imported fabric has a velveteen construction.

For the above reasons, it is concluded that the merchandise in issue is properly classifiable under item 320.14, as claimed by plaintiff. Judgment will be entered accordingly.

[18] It is by now "axiomatic" that samples are potent witnesses.

Decisions of the United States Customs Court

Customs Rules Decision

(C.R.D. 76–10)

FAIRFIELD GLOVES ET AL. *v.* UNITED STATES

Motion to Correct Filing Date and Cross-Motion to Suspend

1. LEGISLATIVE DELEGATION OF AUTHORITY

Rules of court adopted in conformity with authority delegated by statute to make rules of practice, pleading and procedure have the same force and effect as if expressly included in the statute.

2. ACTION PURSUANT TO DELEGATED AUTHORITY

Where Congress in 28 U.S.C.A. § 2632(a) delegates to the Customs Court authority to determine the manner of filing a summons, and mailing is recognized in statutes and decisions as a manner of filing, the Customs Court's promulgation of rule 3.2(b) which deems the date of mailing as the date of filing is a proper exercise of the delegated authority.

3. A MOOT CASE

Where due to a change in circumstances before decision an actual controversy has ceased to exist the case is moot.

Court Nos. 76–1–00301, etc.

Port of Los Angeles

[Motion to correct records of clerk granted; cross-motion to suspend denied.]

(Dated October 15, 1976)

Glad, Tuttle & White (*Robert Glenn White* of counsel) for the plaintiffs.

Rex E. Lee, Assistant Attorney General (*Edmund F. Schmidt*, trial attorney), for the defendant.

RICHARDSON, Judge: On January 30, 1976 the clerk of the Customs Court received by certified mail from plaintiffs' counsel summonses and filing fees in five cases which were required to be filed January 28, 1976. The certified mail envelope containing the summonses and filing fees did not contain a postmark date. Plaintiffs' counsel made an affidavit that they were mailed by certified mail January 28, 1976, and attached to his motion to have the date of filing corrected to January 28, 1976 (the 180th day after the denial of the plaintiffs' protests), as an exhibit, his receipt for certified mailing which is date-stamped January 28, 1976.

The defendant accepts January 28, 1976 as the date of certified mailing, but challenges the validity of rule 3.2(b) which does not require that the date of physical receipt of the summons by the clerk be the only acceptable *method* or *manner* of filing, and deems the summonses as filed on the date of certified mailing. The defendant contends that the summonses were not filed until physically received by the clerk of court, January 30, 1976 (182 days after the denial of plaintiffs' protests), and that the court was acting *ultra vires* when it adopted rule 3.2(b); and in the defendant's opinion enlarged the statutory jurisdiction of the court. In a cross-motion the defendant moved that the plaintiffs' five "actions" (four of which it regarded as untimely filed) be suspended pending the final determination of *Gotham Knitting Mills, Inc.* v. *United States*, Customs Court No. 75–10–02525.

Because the defendant was in effect seeking by its cross-motion to suspend "motions" rather than "actions" which it contended were untimely filed, and there is no provision in the statutes or rules for suspending one motion pending the final determination of another motion, and the controversy which arose over whether motions challenging the validity of court rules should be determined by a single judge or a panel of three judges, the court elected to hold in abeyance the action on the motion and cross-motion pending disposition of the *Gotham Knitting Mills, Inc.* case.

Before any ruling was made by the Customs Court on rule 3.2(b) in the *Gotham Knitting Mills, Inc.* case, the plaintiff acting under rule 8.3(a)(1), which permits a plaintiff to abandon its action without order of court at any time before service of a notice of trial, duly abandoned its action, while a petition for a writ of prohibition by the defendant against a three-judge panel passing upon the validity of rule 3.2(b) was pending in the Court of Customs and Patent Appeals. The plaintiff's abandonment of its action made the issue of the validity of rule 3.2(b) moot.

The disposition of the *Gotham Knitting Mills, Inc.* case leaves the issue of the validity of rule 3.2(b) still unresolved.

The nature of the Customs Court as a national court presupposes that there must necessarily be mailings of summonses from a large number of geographical areas. There are numerous varieties of ways in which letters are processed in the postal service today resulting in difficulties of determining the exact date a letter is deposited in the mails addressed to the clerk of the United States Customs Court.

1. Many letters deposited in the mails today contain only the name of the city and state in which the letter was deposited, with no date.

2. Some machines do not show the city and state in which the letter was deposited or the date.

3. The date stamped is not clear on some letters.

4. Some mail contains the city and date stamp but it in fact may not start to travel from that city where deposited to the destination indicated until several days after deposit. For instance, a letter date-stamped in New Rochelle or Pelham, New York, is sent to Mount Vernon, New York, for sorting and dispatching. This is known as zone sorting, which can delay actual travel of the letter to the addressee from the date of deposit.

5. The failure to put the zip code on an envelope delays the processing as the computer will reject a letter without the zip code and such letter may be laid aside for a day or two until someone ascertains the zip code and places it on the envelope by hand.

6. Postage meter machines which may be used by some persons sending mail to the court can be adjusted to show a date other than the actual date of mailing.

7. The time it takes a letter to travel from place of deposit to destination, these days, is such a variable that it is sometimes very difficult, if not impossible, to determine what is the "ordinary course of mail".

It is common knowledge that mail service has deteriorated considerably in recent years. A person using the mails today can no longer estimate with any degree of consistency when a letter he deposits in the mails might reach the addressee. The Customs Court was aware of this situation and felt that the former rule of the court 3.2(d)(3) which permitted a correction of the date of filing a summons upon a showing by satisfactory proof:

> . . . that the summons was sent by registered or certified mail, properly addressed to the clerk of the court . . . with return receipt requested; that it was deposited in the mail sufficiently in advance of the last date allowed for filing to provide for receipt by the clerk on or before such date in the ordinary course of mail; and that the person sending the summons exercised no control over the mailing between the deposit of the summons in the mail and its delivery.

worked a hardship particularly on lawyers at outports to have to travel to New York to present proof of timely mailing. Also, it placed a heavy burden upon the court to constantly have to decide whether a summons was filed within such reasonable time as to have been received in fact by the clerk before the last date for filing had passed, upon muddied evidentiary situations due to varied handling of the mails and irregular deliveries of the postal service, or permit injustice to take its toll because of the uncertainty of the mail situation.

After considerable study of the rules of the Customs Court by its Rules Committee and consultation with representatives of the Customs Bar and the Department of Justice, the Customs Court deleted rule 3.2(d)(3) and unanimously adopted the rule in issue, rule 3.2(b), with full knowledge of the Department of Justice's argument that by rule 3.2(b) the court would be extending its jurisdiction and acting *ultra vires*.

Rule 3.2(b) was proposed and adopted to obviate injustices which would result in rigidly adhering to a single interpretation of the word "filing" to mean actual physical presence and receipt of a required summons in the hands or office of the clerk of the court on a given day, in view of the postal service situation.

The important consideration when an issue is raised as to service of any document is whether it was made within the contemplation of the statute and rules of the court.

28 U.S.C.A., section 2631(a) provides:

> An action over which the court has jurisdiction under section 1582(a) of this title is barred unless *commended* within one hundred and eighty days after:
>
> (1) the date of mailing of notice of denial, in whole or in part, of a protest . . . . [Emphasis added.]

28 U.S.C.A., section 2632(a) provides:

> . . . A civil action shall be *commenced by filing a summons in the . . . manner, . . . prescribed in rules adopted by the court.* [Emphasis added.]

Rule 3.2(b) provides: "For purposes of *commencement* of an action, a summons sent by registered or certified mail properly addressed to the clerk of the court at One Federal Plaza, New York, New York 10007, with the proper postage affixed and return receipt requested, shall be *deemed filed* as of the date of postmark." (Emphasis added.)

It is the opinion of the court that section 2631 does not say that anything shall be "filed" within 180 days; the words "file", "filed" and "filing" are not in that section. It just says an action shall be "*commenced*" within 180 days. It does not say *how* an action is to be

commenced. Section 2632(a) says *how* an action shall be commenced and that is by filing a summons in the *"manner" prescribed in rules adopted by the court.* The word *"manner"* is defined in Black's Law Dictionary, Fourth Edition, 1951, at page 1115, as: "A way, mode, *method* of doing anything, or mode of proceeding in any case or situation." (Emphasis added.)

It is submitted that section 2632(a) delegates to the Customs Court the authority to prescribe in its rules the *"manner"* or *method* of filing a summons. The statute does not prescribe that the summons be "filed with" any specified person. Congress could have specified that "filing shall be with the clerk", but it chose to delegate authority to the Customs Court to determine the "manner" of filing the court deemed best in the light of its experience with procedures under the Customs Courts Act of 1970. Judge Newman in an opinion in *Texas Mex Brick & Import Co.* v. *United States*, 72 Cust. Ct. 291, 294, C.R.D. 74–2, 371 F. Supp. 579 (1974), a case under the former rule 3.2(d)(3) permitting a correction of the date of filing a summons upon satisfactory proof, stated: "I am clear that this court has authority to explicitly provide that something other than receipt may constitute the filing of the summons, particularly since under section 2632(a) Congress specifically authorized this court to adopt rules governing the 'manner' of filing a summons."

Judge Maletz in following *Texas Mex* in *Modern Clothing, Inc.* v. *United States*, 73 Cust. Ct. 233, 236, C.R.D. 74–10 (1974), expressed his view as being "in entire accord with the decision in *Texas Mex* and therefore hold that rule 3.2(d)(3) is a statutorily valid exercise of the court's authority."

The court in rule 3.2 has exercised its delegated authority by providing that a plaintiff may *"commence"* an action in two *"manners"* or *"methods"*: (1) physically filing a summons with the clerk or court or (2) using registered or certified mail to send a summons to the court as provided in subparagraph (b) of said rule and it will be "deemed filed" as of the date of postmark.

"Deemed" is defined in Black's Law Dictionary as: "To hold; consider; adjudge; . . . determine; treat as if; construe."

The word "deemed" has been used to go so far as to treat a summons as timely filed when there wasn't even a summons in existence in the case. See section 122(c) of Pub. L. No. 91–271:

> (c) A protest timely filed with the Bureau of Customs before the effective date of enactment of this Act, which is disallowed before that date, and as to which trial has not commenced by such date, shall be *deemed to have had a summons timely and properly filed* under this title. [Emphasis added.]

Rule 22(2) of the Supreme Court of the United States provides in part that:

> . . . If the original judgment in such a case was entered in a district court in Alaska, Guam, Hawaii, Puerto Rico, the Virgin Islands, or the Canal Zone, the petition [for certiorari] shall be *deemed filed in time if mailed by air-mail under a postmark dated within the thirty-day period or due extension thereof.* [Emphasis added.]

Federal, New York State and New York City income tax returns have to be filed each year on April 15, but mailing on the 15th is *deemed filed* on the 15th, in all three jurisdictions.

Rule 3.2(b) does not extend the statutory period for *filing* a summons, since if the requisites of specified mailing are complied with, the summons is *deemed* filed (viz., on the last date allowed under section 2631(a)(1).

Admittedly there are decisions in courts of appeals applying, in general, a strict construction of the provisions in customs laws fixing the time in which appeals or other documents must be filed with such courts. Among such cases is *United States* v. *Thompson-Starrett Co.*, 12 Ct. Cust. Appls. 28, T.D. 39896 (1923), in which the time for filing an appeal, sixty days, expired on April 1, 1923, a Sunday, and the plaintiff deposited its notice of appeal in the mail in New York City addressed to the clerk of the Court of Customs Appeals in Washington, D.C., on March 31, 1923, a Saturday; and the appeal was received in the office of the clerk on April 2, 1923, a Monday, which was the sixty-first day after the entering of judgment.

The Tariff Act of 1922, section 515, title IV, in effect when the *Thompson-Starrett* case was decided provided that:

> . . . an appeal shall be filed in the United States Court of Customs Appeals *within the time and in the manner* provided by law. [12 Ct. Cust. Appls. at p. 29.] [Emphasis is added to indicate the statute makes abundantly clear that "time" and "manner" are not synonymous.]

The court held that the mailing of an application for appeal *within the time* allowed for appeal was not *in the manner* of filing prescribed by the statute, and that it was incumbent upon an appellant to have the application for appeal in the office of the clerk of the court within the time allowed. The statute expressly prescribed that an appeal shall be "filed in the United States Court of Customs Appeals." The court recognized, however, that "despositing in the mail is sufficient filing" provided that statute treats mailing as filing. 12 Ct. Cust. Appls. at p. 31.

The Court of Customs and Patent Appeals followed the *Thompson-Starrett* case in *Minkap of California, Inc.* v. *United States;* 55 CCPA 1, C.A.D. 926 (1967), a case in which a motion for rehearing was mailed within a thirty-day time limitation, but not received by the clerk until after the expiration of the thirty-day time limitation. The statute involved required a motion for rehearing to be "made" within thirty days and the term "made" was construed to mean "filed". The court regarded the situation in the *Minkap* case as analogous to the *Thompson-Starrett* case and at page 3 reiterated that depositing in the mail will not be regarded as sufficient filing and compliance with a statute which prescribes that filing must be at a definite place and within a specified time.

In another case, *Seneca Grape Juice Corp.* v. *United States*, 61 CCPA 118, 492 F. 2d 1235 (1974), the Court of Customs and Patent Appeals denied a petitioner's motion to have a notice of appeal, postmarked in New York City, January 25, 1974, and received in the clerk's office on January 29, 1974, one day later than the sixty-day period for filing notices of appeal, accepted *nunc pro tunc* as of January 28, 1974. The appellate court in a per curiam opinion, followed its decision in *Minkap of California, Inc.* v. *United States*, and stated that its rule 3.1(a) requires that a notice of appeal must be filed "in the office of the clerk of the court", and that rule 25(a) of the Federal Rules of Appellate Procedure provides that filing may be accomplished by mail addressed to the clerk but "filing shall not be timely unless the papers are *received by the clerk* within the time fixed for filing . . . ."

The foregoing two rules do not contain a provision similar to that in rule 3.2(b) of the Customs Court, and the second rule, rule 25(a) of the Federal Rules of Appellate Procedure expressly requires receipt by the clerk of a notice of appeal within the time fixed for filing. It is submitted that what constitutes filing under rules of federal appellate procedure is to be distinguished from what constitutes filing under the rules of the Customs Court.

In the *Thompson-Starrett* case, the *Minkap* case, and the *Seneca Grape Juice* case there was no statute involved, as in the instant case, delegating authority to the court to promulgate by rule of court the *manner* or method of filing an appeal, nor was there any rule of court, pursuant to such delegation of authority, in existence recognizing mailing as an alternate *manner* or method of filing an appeal. It is submitted that in 1970 when Congress enacted 28 U.S.C.A. § 2632(a), delegating to the Customs Court authority to provide in its rules the "manner" of filing a summons, it must have contemplated that the Customs Court might provide for the alternate "manner" of filing recognized as proper, if duly authorized, in the *Thompson-Starrett*

case—namely mailing. Rules of court adopted in conformity with authority delegated by statute to make rules of practice, pleading, and procedure have the same force and effect as if expressly included in the statute. *District of Columbia* v. *Hunt*, 163 F. 2d 833 (D.C. Cir. 1947); *MacNeil* v. *Hearst Corp.*, 160 F. Supp. 157 (D. Del. 1958); *Carlis* v. *Stratigos*, 186 Misc. 337, 61 N.Y.S. 2d 456 (N.Y. Sup. 1946).

Between the time the *Thompson-Starrett* case was decided in 1923 and the enactment of 28 U.S.C.A. § 2632(a), in 1970, the federal trial courts had adopted what has sometimes been described as a liberal approach in the application of periods of limitation rules and decisions.

The Federal Rules of Civil Procedure in rule 6(a) promulgated pursuant to 28 U.S.C.A. § 2072 provides that when the last day for taking an action expires on a Saturday, a Sunday, or a legal holiday, the statutory period runs until the end of the next day which is neither a Saturday, a Sunday, nor a holiday. Many federal court decisions prior to this rule were to the contrary.

The Court of Appeals for the Fifth Circuit in construing this rule in *Wilson* v. *Southern Ry. Co.*, 147 F. 2d 165 (5 Cir. 1945) said at page 166:

> . . . The committee reports and discussions preliminary to the formulation of the rules indicate that the purpose was to change the *method* of computing the three-month period prescribed by the statute under consideration, and the language of the rule clearly effectuates that intent. The rule does not attempt to change a jurisdictional statute, but merely provides *a method of computing the statutory period* different from that fixed by judicial decision. . . . [Emphasis added.]

Other decisions to the same effect are: *Jacobs Pharmacy Co., Inc.* v. *United States*, 71 F. Supp. 584 (N.D. Ga. 1947) and *Union National Bank* v. *Lamb*, 337 U.S. 38 (1949). In the latter case at pages 40–41 Mr. Justice Douglas held that where the last day of the period within which a review by certiorari might be filed falls on a Sunday or legal holiday, a filing on the next day which is not a Sunday or legal holiday is timely. Mr. Justice Douglas stated: "That rule [6(a), a rule of the district courts] provides the *method* for computation of *time* prescribed or allowed not only by the rules or by order of court but by 'any applicable statute.'" (Emphasis added.) He further stated: " . . . we think that the considerations of liberality and leniency which find expression in Rule 6(a) are equally applicable to 28 U.S.C. § 2101(c) [with respect to petitions for certiorari]. The appeal therefore did not fail for lack of timeliness."

The Customs Court in a decision in 1952, *Thalson Co.* v. *United States*, 28 Cust. Ct. 536, R.D. 8080, followed the liberal approach in

the application of periods of limitation as reflected in rule 6(a) of the federal rules, in a situation where the time for filing an appeal for a reappraisement (30 days) expired under the Tariff Act of 1930 on August 23, 1947, a Saturday, and the court held its receipt on the next day that the office was regularly open for business August 25, 1947, a Monday, was timely. This decision was affirmed in a review by the Second Division of the Customs Court in 32 Cust. Ct. 663, A.R.D. 40 (1954). The decision of the *Thalson* case on timeliness was followed in *Hawaiian Oke & Liquors, Ltd.* v. *United States*, 28 Cust. Ct. 58, C.D. 1388 (1952); *Railway Express Agency, Inc.* v. *United States*, 30 Cust. Ct. 424, Abs. 57260 (1953); *Lustre Fibers, Inc.* v. *United States*, 31 Cust. Ct. 318, Abs. 57663 (1953); *F. W. Myers & Co., Inc.* v. *United States*, 35 Cust. Ct. 38, C.D. 1718 (1955). It was embodied in rule 37 of the Customs Court in 1955. The rule has been consistently followed by the Customs Court for over 21 years, and is now rule 3.6(a).

It is the view of this court that rule 3.2(b) is a proper exercise of authority delegated to the Customs Court in 28 U.S.C.A. § 2632(a), and is in line with the liberal approach to periods of limitation reflected in Customs Court rule 3.6(a), Federal Rules of Civil Procedure 6(a), Supreme Court of the United States rule 22(2), and the court decisions under these rules. It is not *ultra vires* and it does not enlarge the statutory jurisdiction of the Customs Court. It is not inconsistent with law and is deemed necessary for the orderly functioning of the Customs Court.

There is a reported decision of the Customs Court holding rule 3.2(b) to be invalid in that the rule permits a summons mailed before the expiration of the period for filing, but received after the period for filing, to be deemed filed and thus timely. *Harold Koren & Co., Inc.* v. *United States*, 76 Cust. Ct. —, C.D. 4651, 10 Cust. Bul. No. 25, p. 28 (May 26, 1976). This case is not *stare decisis* of the issue of the validity of rule 3.2(b) as the issue in that case had become moot before the judge undertook to decide the case, and the decision is given no weight in this opinion.

The function of a decision is to decide a controversy affecting the rights of some party to the litigation. Where due to a change in circumstances before decision an actual controversy has ceased to exist and there is no live question to decide, a decision whether or not relief should be granted is an empty formality and of no effect.

Facts extrinsic to the reported decision in the *Koren* case, but part of the official file show the issue in that case to have been moot May 18, 1976, eight days before the date of decision, May 26, 1976.

At a hearing on the *Gotham* case, May 18, 1976, the court made an inquiry of plaintiff's counsel as to what disposition he proposed to make in the *Koren* case, a similar case involving two protests that was not calendared for hearing that day. Plaintiff's counsel responded that ". . . if it is appropriate, your Honor, we would make a motion at this time to have those cases abandoned. If it is not, we will file a Notice of Abandonment." (R. 17.) Defendant opposed abandonment and the court reserved decision on the motion to abandon. Subsequently, on the same day, plaintiff filed a notice of abandonment pursuant to rule 8.3 which led to the dismissal of the case by the clerk on May 21, 1976.

On May 24, 1976, the court took the position that since a motion for leave to abandon was pending, the notice of abandonment filed by plaintiff should not be given effect and that the motion for leave to abandon should be denied, and made the following orders:

> ORDERED, that the dismissal of the case entered by the clerk be set aside, and it is further
> ODERED, that plaintiff's motion to abandon this action be and the same hereby is denied, and it is further
> ORDERED, that the notice of abandonment filed by plaintiff be rejected, and it is further
> ORDERED, that the Clerk make the appropriate entries in the docket sheet of this case to reflect the actions taken in this order.

Rule 8.3(a)(1) of the Customs Court provides that:

> . . . Before service of notice of trial, an action may be voluntarily abandoned and dismissed, without order of court, by filing a notice of abandonment . . . .

Part (iv) of said rule provides that:

> (iv) When an action is abandoned by notice of abandonment, the clerk, without order of the court, shall make an appropriate entry of dismissal . . . .

There was no notice of trial filed in the *Koren* case, and the plaintiff and clerk did what rule 8.3(a)(1) prescribes to accomplish the dismissal of the case at any time before a notice of trial. Their action ended the trial judge's jurisdiction, and his attempt to resurrect and breathe life into a case after a proper dismissal, without an order to show cause as to why compliance with rule 8.3(a)(1) should not be nullified and the clerk's entry of dismissal should not be opened or vacated, is ineffective. When the plaintiff voluntarily abandoned its action the case became moot.

Ordered that the date on the summonses of filing of the five actions listed on the attached schedule "A" shall be corrected to and hereby is established as being January 28, 1976, and the cross-motion to suspend is denied.

Notwithstanding the disposition made herein the court deems it appropriate to state that it appears that a controlling question of law is involved in this case which contains an issue important to the whole bar and should be decided and resolved with finality at the earliest possible date; and an immediate appeal from this order may materially advance the ultimate determination of the action. Therefore, an interlocutory order is granted for application to be made to the Court of Customs and Patent Appeals for an appeal within 10 days after entry of this order.

Decisions of the United States Customs Court

Abstracts

Abstracted Protest Decisions

DEPARTMENT OF THE TREASURY, *October 18, 1976.*

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

VERNON D. ACREE,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/217	Richardson, J. October 12, 1976	Winter Wolff International Corp.	73-8-02160	Item 657.35 7.5% + 0.6¢ per lb.	Item 654.00 5%	Summary judgment	New York Brass closet flanges, 14 ozs.
P76/218	Watson, J. October 12, 1976	J. C. Penney Purchasing Corp.	68/10616	Item 748.20 28%	Item 774.60 17%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279)	Norfolk Artificial flowers, etc.

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P76/219	Richardson, J. October 12, 1976	General Instrument Corporation	71-8-00705, etc.	Item 685.80 12.5%, 12%, 11% or 10% (capacitors) Item 687.00 12.5%, 11%, 10% or 7% (diodes, transistors) Item 685.20 10%, 9%, 8%, 7% 6% or 5% (yokes, tuners convergence box assemblies, certain flybacks, certain color delay lines) Item 682.10 or 682.05 12.5% (I.F. transformers, some flybacks Item 682.60 12% (some color delay lines) Without allowance under item 807.00	As assessed, *supra*, with cost or value, as shown on commercial invoices, of U.S. fabricated components (items marked "B", "C", "D", "F", "J", "K", "M", "N", "P") deductible from full value of imported merchandise pursuant to item 807.00	General Instrument Corporation v. U.S. (C.A.D. 1106, items marked "B"); (C.D. 4470, items marked "C"); (C.A.D. 1062, items marked "D"); (C.A.D. 1128, items marked "J"); (C.D. 4507, items marked "K") Agreed statement of facts (items marked "F", "M", "N", "P")	New York American goods returned U.S. components of capacitors ("B"), diodes ("C"), transistors ("D"), color delay lines ("F"), television deflection yoke ("J"), flybacks ("K"), tuners ("M"), I.F. transformers ("N"), convergence box assemblies, ("P")

Judgment of the United States Customs Court in Appealed Case

OCTOBER 6, 1976

APPEAL 76–28.—United States v. The Newman Importing Co., Inc.—TENTS—ARTICLES OF TEXTILE MATERIAL—SPORT ["BACKPACKING"] EQUIPMENT—TSUS.—C.D. 4648. Appeal dismissed September 15, 1976.

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